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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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April 15, 1955.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO



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No. .....

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION, AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your Petitioners, Intertype Corporation, a New York corporation, Merchants Matrix Cut Syndicate, Inc., an Illinois corporation, and The Advertising Checking Bureau, Inc., an Illinois corporation (sometimes referred to herein as Intertype, Merchants and Advertising, respectively), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 17, 1955 in the case of The United States of America v. Merchants Matrix Cut Syndicate, Inc. and Intertype Corporation, No. 11017 in said court, together with the judgment of the same court

entered on the same day pursuant to the same opinion, in the cases of Intertype Corporation v. Clark-Congress Corporation, Merchants Matrix Cut Syndicate, Inc. v. Clark-Congress Corporation, and The Advertising Checking Bureau, Inc. v. Clark-Congress Corporation, Nos. 11018-11020 in said court.

OPINIONS BELOW.

The United States District Court for the Northern District of Illinois, Eastern Division, rendered no opinion in this case. Its Findings of Fact and Conclusions of Law with respect to three of the five judgments (R. 1077-1088) are printed at pp. 47-60, and its jury instructions with respect to the other two judgments (R. 549-558) are printed at pp. 60-69, in the Appendix bound with this Petition. The opinion of the Court of Appeals for the Seventh Circuit is printed at pp. 71-87 in the Appendix, and is reported in 219 F. 2d at p. 90.

JURISDICTION.

The judgments of the Court of Appeals were entered on January 17, 1955 (App., pp. 88, 89). Various petitions for rehearing filed by the petitioners were denied on February 23, 1955 (App., p. 91). The jurisdiction of this Court is invoked under Title 28, U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Did the Court of Appeals have the authority to totally disregard the evidence, the findings of fact and the jury instructions and verdicts, and reverse these five judgments without pointing out anything clearly erroneous and prejudicial in the proceedings below, despite the express provisions of Rules 52(a) and 61 of the Federal Rules of Civil Procedure?

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2. Do the prior decisions of this Court in federal eminent domain cases extend the immunity of the sovereign to protect petitioners' private landlord against liability for violating petitioners' rights under the law of the State of Illinois?

3. Do the prior decisions of this Court in federal eminent domain cases conflict with the Federal Rules of Civil Procedure which authorized the District Court to hear and determine petitioners' claims for relief against their landlord in separate proceedings, but as a part of the condemnation case arising out of the same transactions?

4. Did the statutes authorizing the General Services Administration to lease and improve office space warrant the taking of petitioners' property immediately without depositing its estimated value, remodeling it at unauthorized expense, and delaying the payment of compensation to petitioners for more than three years after the taking?

5. Do the arbitrary means employed in the peacetime taking of petitioners' leased space for occupancy by the Bureau of Public Debt without just compensation to this day, aggravated by the reversal of the jury verdicts without even a hint as to how the new trial could be conducted to avoid another appeal and reversal, constitute a denial of the due process of law and just compensation guaranteed to petitioners by the Fifth Amendment?

6. Did the Court of Appeals have discretion to override the consent of the trial attorneys for the United States to the instructions given to the jury, and their stipulation that Intertype be compensated for the value of the entire remaining time of its leasehold instead of the value of only five years of it, and did such whipsawing of the condemnees in the circumstances of this case add up to a denial of their right to due process of law?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

1. Constitution.

Amendment V to the Constitution of the United States:

> "No person shall * * *; * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Statutes and Rules.

Title 28, U. S. C., § 1652, June 25, 1948, c. 646, § 1, 62 Stat. 944:

> "§ 1652. State laws as rules of decision.
>
> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

The other Statutes and Rules involved are cited below. In view of their aggregate length they are printed at pp. 41-46 in the Appendix bound with this petition.

Title 40 U. S. C. § 304c, Aug. 27, 1935, c. 744, § 3, 49 Stat. 886; July 18, 1940, c. 635, § 3, 54 Stat. 765; June 14, 1946, c. 404, § 4, 60 Stat. 257; June 30, 1949, c. 288, Title I, § 103, 63 Stat. 380.

Title 40 U. S. C. § 257, Aug. 1, 1888, c. 728, § 1, 25 Stat. 357; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 6, 62 Stat. 986.

Title 40 U. S. C. § 258a, Feb. 26, 1931, c. 307 § 1, 46 Stat. 1421.

Federal Rules of Civil Procedure:

Rule 13, Subparagraphs (a), (b), (g) and (i).
Rule 18(a).

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Rule 42(b).
Rule 52(a).
Rule 61.
Rule 71A, Subparagraphs (a) and (e).

STATEMENT.

This case presents for review five judgments totalling $357,726.67, entered in 1953 by the United States District Court for the Northern District of Illinois, Eastern Division and reversed on January 17, 1955 by a single opinion of the Court of Appeals for the Seventh Circuit.

Two of the judgments were awards of compensation for the Government's taking of two of the petitioners' rights and interests, as lessees from respondent, Clark-Congress Corporation, in certain parts of the Rand McNally Building in downtown Chicago, Illinois. These two judgments were based on jury verdicts determining the value of the property taken from Intertype and Merchants, respectively (R. 616, 617).

The other three judgments were rendered by the district judge after a subsequent trial without a jury in the same proceeding. They awarded damages to the three petitioners as tenants, against Clark-Congress Corporation as their landlord, because it committed breaches of the covenants of quiet enjoyment in their leases during a period prior to the institution of the Government's condemnation proceedings.

Petitioners' various rights and claims arose out of a train of events beginning shortly before June 22, 1951. After brief negotiations, (R. 674) the General Services Administration, housekeeping agency for respondent United States, on that date entered into a lease (R. 81-93) with respondent Clark-Congress Corporation, an Illinois corporation which owned the Rand McNally building in

downtown Chicago. The purpose of the lease was to acquire office space for the Bureau of Public Debt (R. 681), an old-line agency then housed in the Merchandise Mart in Chicago (R. 682).

Title 40, U. S. C., Section 304c (App., p. 41), authorized the Government to lease office space outside of the District of Columbia but only for terms not exceeding five years. The lease in a single document assured the Government of the right to possession for ten years and five months, divided into three periods as follows:

(a) A transition period from August 1, 1951 to December 31, 1951, under which the Government leased 80,000 square feet of vacant space in the Rand McNally building with a provision for the Government's taking over additional space as the same might become available through the expiration, termination, or cancellation of existing tenancies. (R. 81-2.) During this period Clark-Congress Corporation, the landlord, was to remain in possession and operate the property. (R. 84.) The Government was just a co-tenant with petitioners. The petitioners' claims against Clark-Congress arose during this transition period.

(b) A five-year term commencing January 1, 1952 and expiring December 31, 1956 in which the Government leased for $2,500,000 ($500,000 per year) the entire building ostensibly[1] "subject to existing leases" and assumed

1. The trial court held (Conclusion of Law No. 4, App. p. 56): "The provision that the Government lease was subject to the Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., leases was not a bona fide provision, and the lease, on its face, clearly shows that, at the time of making thereof, it was contemplated both by the Government and Clark-Congress Corporation that by one means or another the Government would end and terminate the right of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., to occupy their said spaces at the earliest practicable date. The letters sent to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., by the Government fix that date as of November 1, 1951."

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the entire operation and management at $308,000 per year (R. 440) and extensive remodeling and repair of the premises (R. 82, 84) at a stipulated total cost of $2,500,000 for the five years (R. 609-610).

(c) An option to renew for a further term of five years, commencing January 1, 1957 and expiring December 31, 1961 at the same rental and on the same provisions (except as to remodeling) as the 1952-1956 term (R. 83).

At the time of making this lease the Rand McNally Building was occupied by approximately eighty tenants under eighty leases which ran for varying terms of years. Only four small leases were to expire prior to December 31, 1951 (R. 1000-1003). Petitioner Intertype's lease was to expire December 31, 1958.[2] Petitioner Merchants' lease was to expire August 31, 1953. Petitioner Advertising's lease was to expire April 30, 1955. These leases comprised the business homes of the petitioners and their main offices in the City of Chicago.

On June 22, 1951, the same day its lease was entered into, the Government mailed letters advising petitioners and the other tenants in the building that it required their spaces (R. 586, 603, 1012). As a result of consternation and confusion caused by these letters, eleven tenants left the building in August of 1951 and fourteen others followed in September, 1951 (R. 1004-6).

Commencing on October 9, 1951, the Government, with the active cooperation of Clark-Congress Corporation, commenced extensive remodeling throughout the building (R. 701). Twenty-three more tenants departed during October, 1951, and the balance of the tenants, except the petitioners, had all abandoned the building by December 3, 1951 (R. 945).

The events during this transition period, when respond-

2. The Government and the landlord stipulated in writing during the trial that the Government's taking should be considered the taking of the entire balance of Intertype's term (R. 108-9).

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ent Clark-Congress was still in charge of the building and when the Government was merely a tenant in certain space in the building (not yet having condemned petitioners' leaseholds) can best be stated in the language of Findings of Fact (R. 1077-1083, App., pp. 47-55) of the trial court, which had heard the testimony of numerous witnesses and judged their competence and their credibility. Key Findings include the following:

> "4. Following the execution of said lease, Clark-Congress Corporation between the period from June 22, 1951, and to and including December 31, 1951, permitted the United States Government, the General Services Administration, and their employees, agents, and servants, including contractors, subcontractors and laborers engaged in remodeling of the building, free and unlimited access to the building and acquiesced in and permitted such persons to knock down walls, tear out partitions, create dust, noise and disturbance throughout the building, usurp and interfere with elevator service, toilets, corridors and other services used by the tenants, interfere with and interrupt electrical, steam, and other utilities furnishing light and power to tenants,[3] and by correspondence and unlawful de-

3. The nature and extent of the disturbance of petitioner's possession is also expressed in Findings 10 and 15 (App., pp. 50, 52-53), as follows:

> "10. * * * alterations and reconstruction of the building in October, November and December of 1951, in the manner shown by the evidence; * * * resulted in creating excessive dust, noise, and other disturbances, interference with the elevator, electrical, steam and other services, obstruction of corridors and of the courtway and loading facilities of the Rand McNally Building."
>
> "15. The acts of Clark-Congress Corporation and of the United States of America in the Rand McNally Building, during the period from June 22, 1951, to December 31, 1951, were far above and beyond the usual and ordinary remodeling that customarily goes on in a building of this type, * * * and created great noise, dust, confusion, uncertainty and unrest among the employees of said tenants, as well as very material disturbance of said tenants' comfort and business.
>
> "* * * the alteration and reconstruction of the building during the months of October, November and December, 1951, disturbed Merchants Matrix and its possession of the premises

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mands for possession to harass and disturb tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., and generally to interfere with and disturb the orderly and normal operation of the building which the tenants in possession were entitled to under their leases then in force.

"5. Clark-Congress Corporation, its employees and agents, were in control of the building during said period from June 22, 1951, to December 31, 1951, * * * [and] acquiesced in and participated in a concerted effort to force or induce the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., to vacate or abandon the building and to surrender their leases, notwithstanding the fact that said leases were in full force and effect and that the Merchants Matrix Cut Syndicate leases had approximately two years to run, the Intertype Corporation lease had more than seven years to run, and The Advertising Checking Bureau, Inc., lease nearly four years to run.

* * * * *

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under lease to it and rendered the premises unfit for occupancy for the purposes for which Merchants Matrix had leased and occupied them and deprived Merchants Matrix of the beneficial enjoyment of the premises by unduly interfering with its normal business operations and caused Merchants Matrix to abandon the premises. * * *

"A hole was knocked through the walls of Intertype's space while it was in lawful possession thereof during the process of demolition of adjoining space.

"Some of the demolition work done during this period was in the space adjoining the space occupied by The Advertising Checking Bureau, Inc., and in space on the ninth floor directly above the space occupied by The Advertising Checking Bureau, Inc. The noise caused by such demolition work was so great that often it was necessary for officers and employees of this tenant to discontinue telephone conversations and advise the caller that the person talking would call back when the noise lessened. This noise also made it impossible for this tenant to use Ediphone dictating machines in its space. As of November 10, 1951, the position of The Advertising Checking Bureau, Inc., as a tenant in the space occupied by it became intolerable, and on that day it determined that its rights as a tenant were being disregarded, and it decided to remove from the Rand McNally Building as soon as possible. * * *"

"7. It is apparent from the evidence and the lease of June 22, 1951, that a definite and wilful plan and intention existed and was carried out by the joint and combined efforts of Clark-Congress Corporation, the United States Government, the General Services Administration, and their respective employees, agents and servants to rid the Rand McNally Building of all or substantially all tenants as soon as possible after June 22, 1951 to secure possession of the space occupied, respectively, by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., prior to January 1, 1952, and to secure substantially complete possession of the entire building for the Government on or about January 1, 1952, in so far as their combined efforts could bring this about.

* * * * *

"11. The failure of Clark-Congress Corporation to interfere with, complain about, or protect the tenants against, the actions of the Government in the alteration and reconstruction work, and the letters from the General Services Administration demanding that the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., remove from the building, was a breach of the landlord's duty of furnishing to its tenants under continuing leases protection against interference and disturbance by third parties of their tenancies.

"12. Clark-Congress Corporation, in accordance with the terms of its lease to the Government, did certain acts of its own to interfere with the tenancy of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., including curtailment of services and letting the Government tear down walls in spaces as to which Clark-Congress was still the landlord, and also co-operated with the General Services Administration in encouraging and permitting undue interference with the tenancies of said three tenants, and authorized and ratified certain acts done by the General Services

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Administration in alteration and reconstruction of the building, and in all of these actions was a joint tort-feasor with the General Services Administration.

"13. Clark-Congress Corporation * * * breached its duties of quiet enjoyment to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc. and other tenants in possession.

* * * * *

"16. As a result of the foregoing, Merchants Matrix Cut Syndicate, Inc., has suffered actual damages in the amount of $44,027.91, * * * Intertype Corporation has suffered actual damages in the sum of $41,498.98, * * * The Advertising Checking Bureau, Inc., has suffered actual damages in the sum of $96,949.78, * * *"

In short, the trial court found that Clark-Congress Corporation had knowingly and intentionally inflicted substantial injury upon each of the petitioners in violation of its duties as a landlord under their leases and under the law of Illinois.

On December 12, 1951 (R. 7) the Government instituted condemnation proceedings under Title 40, U. S. C. Sections 257 and 304(c) against the three petitioners, who were the only tenants remaining in the building. A declaration of immediate taking was also filed by the Government, reciting as the authority for immediate taking, Sections 257, 258(a) to (e), and 304(c) of Title 40, U. S. C. The Government deposited for the benefit of Intertype the sum of $5,250.00, for Merchants, $6,645.00, and for Advertising, $10,000.00. The declaration of taking, however, clearly stated that, far from being the estimated value of the leaseholds being taken from these particular tenants, as required by Section 258a, the deposits were the amounts "estimated by the acquiring authority to be just compensation for that portion of the aforesaid term commencing January 1, 1952 and ending June 30, 1952" (R. 11).

Respondent Clark-Congress Corporation, the landlord, was made a party defendant in the condemnation proceeding by the United States.

In the condemnation case a summary judgment was entered against Advertising, the trial court finding it entitled to no compensation from the United States because of a so-called "condemnation clause" in its lease. With regard to Intertype and Merchants, a jury trial was had in the course of which evidence as to the value of space in the Rand McNally building ranged from far above (R. 362, 365) to far below (R. 179) the valuations finally arrived at by the jury verdicts. Two judgments awarding just compensation for the value of their respective leasehold interests were entered on January 29, 1953 in the District Court—one in favor of Intertype in the amount of $131,500.00, and the other in favor of Merchants in the amount of $43,750.00 (R. 618).

Several months later, the counterclaim[4] and cross-claims[5] proceedings were tried before the District Judge. These were claims against the landlord based on the events of October through December, 1951, while Clark-Congress was fully responsible,—torts against the petitioners committed by the landlord and by remodelling contractors, moving contractors and co-tenants with the cooperation, authorization and consent of the landlord; and the landlord's breach of the covenants of quiet enjoyment of petitioners' premises prior to the condemnation proceedings by making a second lease for the space

4. Intertype Corporation had counterclaimed against Clark-Congress Corporation as an adverse party since in all respects it was aligned with the Government (R. 39). The Government's designation of Clark-Congress as a defendant was of course not conclusive. See Rule 19, F. R. C. P.

5. Merchants Matrix and Advertising had filed cross-claims against Clark-Congress, their co-defendant (R. 44, 45). The propriety of the designations of the three tenants' claims is immaterial in view of Rule 8(c), F. R. C. P.

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already under lease to the tenants, and by planning and actively participating in harassment and other activities to compel the petitioners to vacate the premises.

These claims against the landlord were founded upon the law of landlord and tenant, and not upon the law of eminent domain. Their filing in a condemnation case was appropriate under Rules 71A, 13 and 18, F. R. C. P., because the same parties were involved and they arose out of the events which culminated in the taking of petitioners' property. Before petitioners' property was taken by the United States, the Government had no legal right to interfere with petitioners' quiet enjoyment of their premises and of the services and facilities of the building. All through that time, respondent Clark-Congress was in charge of the building and had the legal duty to protect petitioners from any such interference.

Judgments for the amounts indicated in Finding of Fact 16, *supra*, were entered on June 26, 1953, in favor of the respective petitioners and against respondent Clark-Congress (R. 1088-90). The damage figures included moving costs for each petitioner. Advertising's judgment against Clark-Congress also included the market value of its lease (less rent reserved)[6], in addition to its moving costs.

The Government filed an appeal from the two condemnation judgments (R. 1123). Clark-Congress filed three separate appeals, one from each judgment against it (R. 1130-3). The Court of Appeals reversed all five judgments in the opinion (App., pp. 71-87) of which petitioners now seek review.

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6. Since Merchants and Intertype were recovering the market value of their leases, over and above the rent reserved, from the Government, this element was omitted from their judgments against Clark-Congress.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals affects two vital areas of constitutional law, and entangles them both so hopelessly that the decision will be dangerous if not reversed.

In the area of the Bill of Rights,—the safety of private property against arbitrary confiscation by the Government,—the effect of the decision is to permit officers of the Government to take private property in its name, without statutory authority, without making lawful provision for just compensation and without due process of law. Moreover, it has the effect of cloaking a private property-owner who enters into an agreement with the Government with similar tyrannical power and with a degree of immunity to the claims of its injured tenants measured by the immunity of the sovereign itself.

In the area of State-Federal relations under the federal system, it deprives tenants of their fundamental right to invoke the laws of the States to redress injuries inflicted on them by landlords.

The decision below also raises an important question under the Federal Rules of Civil Procedure. While recognizing that the applicable Rules[7] allow condemnees to plead and prove claims against other parties in condemnation cases, the ambiguous opinion below either restricts a condemnee injured *by another private citizen* in transactions leading to the eventual condemnation of his property to his remedies against the condemnor or, if it merely holds that petitioners' mistake was procedural, in filing their claims *in this cause*,[8] endorses the very multiplicity and

7. Rules 71A, 13, 18(a) and 42(b) F. R. C. P., printed in Appendix, pp. 44-46.

8. See footnote 16 at the end of the opinion, and discussion to which it refers (App., p. 87).

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circuity of actions which the Federal Rules of Civil Procedure seek to avoid. The result of the opinion, however interpreted, is to emasculate the privilege of filing cross-claims and counterclaims against other parties in condemnation cases, a privilege which the first part of the opinion specifically recognizes to be allowed by the applicable Federal Rules of Civil Procedure.

Moreover, the action of the Court of Appeals itself denies due process of law to petitioners, by ignoring stipulations in the record, completely disregarding the evidence and the findings of fact, conclusions of law and jury instructions, paying lip service to Rule 52(a), Federal Rules of Civil Procedure and then grossly violating the rule, placing a sinister and cynical interpretation upon the motives of these petitioners and erroneously applying the measure of damages in condemnation proceedings between condemnor and condemnee to actions between tenant and landlord.

Prior decisions of this Court in eminent domain cases are cited by the court below as compelling these shocking results, although none of them can reasonably be so applied. Prior decisions of this Court stating the fundamental principles violated by the decision below are ignored by the Court of Appeals, and its opinion does not even reflect awareness that they exist. The opinion of the Court of Appeals (App., pp. 71-87) is so hopelessly confusing and so utterly meaningless that even a cursory reading of it will convince this Court that something ought to be done about it.

I.

The decision below cries out for an exercise of this Court's power of supervision. In Rules 52(a) and 61 of the Federal Rules of Civil Procedure, this Court and the Congress of the United States have laid down principles

governing the responsibility of the Courts of Appeals,—principles which have emerged from years of experience with capricious or ill-considered reversals on appeal of sound decisions by trial courts. Thus Rule 52(a) states: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of witnesses." And Rule 61 states that "no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for * * * setting aside a verdict or for * * * disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."

In *U. S.* v. *National Association of Real Estate Boards*, 339 U. S. 485 (1950), this Court, at p. 49, said:

> "* * * our *mandate* is not to set aside findings of fact 'unless clearly erroneous'." (Italics supplied.)

U. S. v. *Yellow Cab Co.*, 338 U. S. 338, 342 (1949) and innumerable decisions of Courts of Appeals are to the same effect, including decisions of the Court below, e.g. *Central Ry. Signal Co.* v. *Longden*, 194 F. 2d 310 (7 Cir., 1952).

This is an extreme example of a case in which a Court of Appeals has ignored this important principle and rendered a capricious decision to the serious injury of the rights of petitioners.

The first three and a half pages of the text of the opinion below (App., pp. 72-75), state the case, with certain inaccuracies of slight moment here, and the next six pages lead up to this reluctant concession (App., p. 81): "Only by inserting a judicial rubric in Rule 71A could we interpret it as containing some lurking prohibition against invoking Rule 13. We read that Rule as it is written." Thus the court acknowledges that petitioners' cross-claims and counterclaim were permissible and hence finds

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it necessary to deal with petitioners' judgments against their landlord, although saying (App., p. 81) that "empirical judgment inclines us away" from permitting such claims to be filed in condemnation cases at all.

In the thirteenth page of its opinion, the court summarily disposes of all of the detailed Findings of Fact with respect to petitioners' claims against Clark-Congress, stating (App., p. 83):

> "While the challenged findings are detailed, they are estranged from significant items of evidence disclosed by this record."

This gratuitous remark is never explained. The court, having said no more about any of the other findings, added (App., pp. 83-84):

> "But we do think that the findings, *inter alia*, which exhibit computations of damages predicated upon the 'cost of moving out' of the premises in question, flow from errors of law impairing the three judgments against Clark-Congress."

The above are the only criticisms which the Court of Appeals directed to the trial court's factual findings in support of the three judgments against Clark-Congress. The reversal of these three judgments is thus in direct disregard of Rule 52(a), F. R. C. P., and in direct conflict with the applicable decisions of this Court.

If the Court below can avoid the mandate of the Congress of the United States as expressed in Rule 52(a), F. R. C. P., and the mandate of the decisions of this Court interpreting said Rule by merely paying "lip service" to it, and deliberately writing an opinion devoid of any factual recitals (and containing no law persuasive of a reversal) and thereby attempt to hide this arbitrary evasion of this mandate, then said mandate becomes meaningless to litigants in the United States Courts, and Rule

52(a), F. R. C. P. becomes a nullity. It was beyond the proper province of the court below to ignore the detailed Findings of Fact in the trial court, which findings were based on the trial court's judgment of the credibility of the witnesses, without holding such findings to be "clearly erroneous". The opinion below therefore obviously calls for the exercise of this Court's power of supervision, as it is a clear departure from the proper standard of judicial review and from the accepted and usual course of legal proceedings.

In fact the recent opinion of this Court in the case of *McAllister* v. *U. S.*, 348 U. S. 19, 20 (1954) reversed a Court of Appeals which had used the proper standard of review, because that court had set aside findings of the district court that were not "clearly erroneous". The court below has reversed petitioners' judgments by applying its own new standard of review,—whether the findings were "estranged from significant items of evidence", although it attempts to conceal the fact in confusing and obscure verbiage.

If the opinion below is allowed to stand it will be an open invitation for reviewing courts to deprive litigants of the benefit of the trial judge's observation of the credibility of witnesses, and may well tend to render useless the mandate of Rule 52(a), F. R. C. P., and to deprive litigants of their constitutional right to "due process of law". In addition, trial courts may well be affected by the futility of preparing Findings of Fact if they are to be so cavalierly ignored.

Since the reversal of the judgments against Clark-Congress could not stand upon the statements of the opinion below about the Findings of Fact, it can rest only upon principles of law. Obviously, findings of fact cannot "flow from errors of law," as stated in the confused opinion below, but their effect may depend upon the legal conclusions of the court. However, the Court of Appeals did not discuss

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the trial court's conclusions of law. It merely assumed, without stating why, that it was error for the trial court to apply the Illinois common law to claims between private parties. Instead, it improperly applied the federal law of eminent domain to such claims.

Having thus discarded the three judgments against Clark-Congress, the court next came to the jury awards of just compensation leading to the two judgments against the Government, where no question as to liability could possibly exist, and wrote a truly remarkable one-page-long statement (App., pp. 85-86) as its *only* basis for reversal of these two judgments.

This part of the opinion begins by impugning petitioners' motives:

> "All too frequently, profit seeking motives creep into condemnation cases. This observation, no doubt, will be distasteful to those who envisage the public treasury as fair game in such proceedings;"

continues by uttering truisms which no one in this case would dispute or had disputed:

> "* * * just compensation, only, remains the yardstick in eminent domain proceedings. * * * When the Treasurer disburses compensation in obedience to an order of award, based on condemnation proceedings, public dollars stand in lieu of land, premises or interests, so acquired, and thereafter devoted to public use;"

then quotes from an opinion relied upon in the trial court by all concerned, *U. S.* v. *Petty Motor Co.*, 327 U. S. 372 (1946), and cites two other opinions of this Court which had also been scrupulously followed throughout the trial,—*U. S.* v. *General Motors Corp.*, 323 U. S. 373 (1945) and *U. S.* v. *Westinghouse Electric & Mfg. Co.*, 339 U. S. 261 (1950).

One final gibe at the trial judge and counsel was all that remained to be done (App., p. 86):

> "Perhaps we are underscoring the obvious, but it is our opinion that the jurors' critical and difficult function, here, should not be further complicated by blurred and insufficient instructions or by improper arguments." (Citing two cases.)

The instructions which in the court's eye seemed "blurred", and the arguments which in the court's ear sounded "improper", were not further identified. Petitioners and the trial judge are left in the dark as to why the Court of Appeals has reversed the awards of just compensation based upon the jury verdicts. The "harmless error" rule (Rule 61, F. R. C. P.) is ignored, and the verdicts set aside with no apparent grounds.

We speculate along two lines. First, since the Court of Appeals describes one case cited (*Ramming Real Estate Co.* v. *United States*, 122 F. 2d 892 (8 Cir. 1941)) as "concerning and pointing up deposits made by the government pursuant to statute," the court may have believed that the *Ramming* case held the opposite of what it did hold. In the *Ramming* case, the jury used the high amount of the government's deposit, rather than the lower valuations shown by the evidence, in fixing the amount of compensation. In the instant case the deposits were far below the value proved, and their effect as evidence would therefore appear to have been to reduce the verdict, if the jury attached any weight to them. Second, we speculate that the Court of Appeals may have believed that the men and women on the jury were simply a bad lot, unable to maintain an "especially delicate", "acutely sensitive" equilibrium, after having commenced deliberations "in a positive awarding-state-of-mind." However, we know of no legal basis for reversing a judgment on any such ground.

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Nor does it appear that the legal premise for the court's reversal of the judgments against petitioners' landlord had any logical relation to its decision to reverse the awards of just compensation. The whole basis for reversing the judgments against Clark-Congress appears to have been the fact that moving costs were included as items of petitioners' damages. But moving costs had no bearing on the two judgments of just compensation, since Merchants introduced no evidence as to moving costs before the jury, and Intertype's moving costs, which had been proved pursuant to the *General Motors* case when the Government was planning to take only five years of Intertype's remaining seven year term were excluded from consideration by the jury by explicit instructions (R. 553, App., pp. 64-65) after the Government stipulated (R. 108-9) that its taking had consumed the entire value to Intertype of the seven-year unexpired leasehold. Obviously the court could not properly find that the compensation awards to Merchants and Intertype included any allowance for those expenses which the court deemed unallowable.

For a reviewing court to set jury verdicts aside on the ground of the possible effects of unspecified "improper" arguments and unidentified "blurred" instructions upon the jury's supposed "delicate equilibrium", and "awarding-state-of-mind" is incredible. It elevates spiritualism to a place on the bench and converts an appellate hearing into a seance. It is certainly not "due process of law."

The effect of the decision below is to criticize the jury for performing its sworn duty to determine within the range of evidence, the just compensation for petitioners' property taken by the government, without so much as an intimation of any reason for ignoring the verdict. Public interest requires that the jury system of determining just compensation not be clouded by such an opinion of a reviewing court.

II.

The court below misapprehended and misapplied the decisions of this Court in *U. S.* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *U. S.* v. *General Motors Corp.*, 323 U. S. 373 (1945) and *U. S.* v. *Westinghouse Electric & Mfg. Co.*, 339 U. S. 261 (1950), when it used these cases as its sole authority for holding (App., p. 83) that "these three tenants cannot improve on the amount of compensation [authorized by those cases] by taking damages from their landlord."

The decision below is in irreconcilable conflict with the decisions of this Court which hold that the immunity of the sovereign does not protect parties with or through whom the sovereign deals against liability to those whom they injure in the course of their actions on the sovereign's behalf. *The Bank of the United States* v. *The Planters' Bank*, 9 Wheat. (22 U. S.) 904, 907 (1824); *U. S.* v. *Lee*, 106 U. S. 196, 218-222 (1882); *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U. S. 549, 567 (1922) and other cases dealing with the Fleet Corporation, cited in *Federal Land Bank* v. *Priddy*, 295 U. S. 229 (1935), rehearing den. 295 U. S. 769 (1935); *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381 (1939); *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575, 580-583 (1943).

The basic error of the decision below is expressed as follows (App., p. 83):

> "It would be a strange index of the compensatory redress for the acquisition of private property through eminent domain proceedings to allow these three tenants recovery from their landlord for moving, packing, and other expenses."

And in a clause later on (App., p. 85), stating that petitioners "were attempting to recover from Clark-Congress

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for items not compensable by the sovereign," as if there were anything illegal in that.

The court below believes, obviously, that the tenants' recovery from their landlord is an "index" of their compensatory redress for their loss of private property through eminent domain. This ignores the lack of identity between the landlord and the sovereign.

The court failed to recognize that the sovereign's immunity from suit (except to the extent waived by statute or limited by the Constitution) does not protect those with whom the sovereign contracts. As this Court held in *Sloan Shipyards* v. *U. S. Fleet Corp. and United States*, 258 U. S. 549 (1922) referring to the Fleet Corporation: "the argument that it was so far put in the place of the sovereign as to share the immunity of the sovereign from suit otherwise than as the sovereign allows" (258 U. S. C. 566) "is a very *dangerous departure from one of the first principles of our system of law.*" The decision, penned by Mr. Justice Holmes, continues:

> "But the general rule is that any person within the jurisdiction always is amenable to the law. If he is sued for conduct harmful to the plaintiff his only shield is a constitutional rule of law that exonerates him. Supposing the powers of the Fleet Corporation to have been given to a single man, *we doubt if anyone would contend that the acts of Congress and the delegations of authority from the President left him any less liable than other grantees of the power of eminent domain to be called upon to defend himself in court.*
>
> "* * * The only serious question is whether special remedies have been provided by statute that displace those that otherwise would be at the plaintiffs' command. * * * The plaintiffs are not suing the United States but the Fleet Corporation; and if its act was unlawful, *even if they might have sued the United States, they are not cut off from a remedy against the agent that did the wrongful act. In general the United States cannot be sued for a tort, but its immu-*

> *nity does not extend to those that acted in its name.* * * *" (Italics supplied.)

Thus a party which itself has the power of eminent domain is liable for injuries to private citizens arising out of its exercise of the power to condemn their property. Clark-Congress, in this case, did not have any such power, nor was it as closely identified with the Government as the Fleet Corporation had been, so there was far less reason to limit its liability to correspond to that of the United States.

The decisions of this Court in eminent domain cases were never meant to determine rights between private landlords and private tenants, and should not have been so applied by the court below.

In fact, when a government corporation acts in the capacity of a landlord, it thereby becomes subject to claims of tenants not compensable under the eminent domain clause, as was held in *Gillen* v. *Home Owners' Loan Corp.*, 8 N. Y. S. (2d) 945 (1938), affirmed, 280 N. Y. 261, 21 N. E. (2d) 521 (1939). There the court held:

> "Naturally, Congress would not expect or intend that the corporation or its agents would be permitted to be careless, negligent, or indifferent to the rights of tenants and be favored with immunity from all obligations or liability to them, whether of contract or of tort."

See also, *Prato* v. *Home Owners' Loan Corp.*, 106 F. 2d 128 (1 Cir., 1939). And it makes no difference whether the Government's lease undertakes to reimburse Clark-Congress for any judgments against it in its capacity as the landlord of the building. This Court, in *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 (1943) granted relief to the widow of a customs inspector who died because a ladder broke while he was boarding a ship operated by the defendant under a contract with the U. S. Maritime Commis-

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sion, despite the argument that the United States was the real party in interest, since "the United States ultimately will have to pay it by reason of provisions of the contract between respondent and the Commission." This Court held:

> "Even if we assume, without deciding, that the Commission has contracted to reimburse the respondent for such expenditures, it does not affect the result in this case.
>
> "* * * if petitioner had a cause of action against respondent, it is difficult to see how she could be deprived of it by reason of a contract between respondent and the Commission. Immunity from suit on a cause of action which the law creates cannot be so readily obtained."

The opinion goes on (p. 584) to state that "concessions made by contracting officers of the government" should not be permitted to take the place of Congressional action, in extending the government's immunity to its private contractors, and adds:

> "Such a change would be detrimental to the interests of private claimants, as we have said, since it would subtract from the legal remedies which the law has afforded them. Beyond that it would make the existence of a right to exoneration or indemnity a jurisdictional fact."

In the instant case, the landlord's right (par. 22b of lease, R. 91) to indemnity by the government was actually dealt with by the Court of Appeals as ousting the trial court from jurisdiction to grant relief against the landlord.

The Court of Appeals ordered the claims against Clark-Congress stricken because it believed that these claims sought to recover indirectly from the sovereign what petitioners could not obtain from it directly. This completely ignored the fact that the rights are different. It is the right that determines the liability here, and not the person.

The court's direction on remand that the district court grant the motions to strike these claims (App., pp. 87-90) ignored the fact that these motions were founded upon a notion that the courts should insert a "judicial rubric" in Rule 71A, F. R. C. P., to forbid counterclaims and cross-claims under Rule 13, F. R. C. P.

To sum up this point: The trial court had jurisdiction under the Federal Rules of Civil Procedure to determine the petitioners' claims against Clark-Congress under the common law of Illinois;[9] the facts as found by the trial court showed that the petitioners were all entitled to money judgments for damages; and the item of moving costs was a perfectly proper element of damages in such a case. The Court of Appeals reasoned backwards. It saw the moving cost element of damages and noted that this court in the *Westinghouse* and *Petty Motor Co.* cases had cut that tail off of the eminent domain dog. The court proceeded to cut the tail off of the landlord and tenant dog, an entirely different animal, without any legal justification.

The injustice of the decision is this: the sovereign can take private property with immunity from suit except as the sovereign's own law (the Fifth Amendment) provides for compensation, but the landlord is liable for all private wrongs it commits. As a part of the price of living in an organized society, each private citizen must submit to the eminent domain power of the sovereign, and accept such just compensation as the Fifth Amendment grants, but his rights against private parties are measured by the wrongs done him by such private parties. The Court of Appeals deprived petitioners of their rights against a private party, Clark-Congress Corporation, solely because petitioners did not have the same rights against the Government, a result which is contrary to the decisions of this Court in the analogous situations dealt with in the cases reviewed above.

9. As to Intertype's claim, diversity jurisdiction was also present.

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III.

The court below fell into the error of *Swift* v. *Tyson*, 16 Pet. (41 U. S.) 1 (1842), when it ignored, and failed to apply, the common law of Illinois in reviewing petitioners' judgments against their erstwhile landlord.

The law of Illinois and the general common law of landlord and tenant give a tenant a cause of action for consequential and punitive damages against a landlord who disturbs or permits co-tenants to disturb his quiet enjoyment of the demised premises. *Chapman* v. *Kirby*, 49 Ill. 211, 217-18 (1868); *Dearlove* v. *Herrington*, 70 Ill. 251; *Northern Trust Company* v. *Palmer*, 171 Ill. 383, 388-9, 49 N. E. 553 (1898); *Kesner* v. *Consumers Co.*, 239 Ill. App. 92, 100 (1925); *Woods Theatre* v. *North American Union*, 246 Ill. App. 521, 525 (1927), and cases cited; *Gustin* v. *Barney*, 250 Ill. App. 209, 213 (1928); *Dobbins* v. *Duquid*, 65 Ill. 464, 467 (1872); *Tobin* v. *French*, 93 Ill. App. 18, 22 (1901); *Glickauf* v. *Maurer*, 75 Ill. 289, 20 A. R. 238 (1874); *Case* v. *Minot*, 158 Mass. 577, 33 N. E. 700 (1893); *Wood* v. *Montelcone*, 118 La. 1005, 43 So. 657 (1907); *Dehan* v. *Youree*, 161 La. 806, 109 So. 498, 500 (1926); *Paltey* v. *Egan*, 200 N. Y. 83, 93 N. E. 267 (1910); *Bagby* v. *Hodge*, 297 S. W. 882 (Tex. Civ. App. 1927); *Bancroft* v. *Godwin*, 41 Wash. 253, 83 Pac. 189 (1905); *Alexis* v. *Pittinger*, 119 Wash. 626, 206 Pac. 370 (1922); *Wusthoff* v. *Schwartz*, 32 Wash. 337, 73 Pac. 407 (1903); 51 *Corpus Juris Secundum*, §§ 319-325, pp. 993 *et seq.*

It matters not that the landlord has made its deal with one having the power of eminent domain. In *Dolman* v. *United States Trust Co.*, 134 N. Y. S. 2d 508 (Sup. Ct., N. Y. Co., 1954), the lessor of a private parking lot entered into an arrangement with the city of New York under which the city condemned the property, and the landlord, invoking a condemnation clause, terminated the tenant's valuable lease. There was no moving, demolition or construction

work to interfere with the tenant's use of the premises; just the termination of the lease and a continuation of the tenant in possession on a tenancy at will.

The tenant filed a complaint for damages, alleging that the landlord violated the covenant of quiet enjoyment. Denying a motion to dismiss, the Court held (pp. 510, 511):

> "* * * For, if the plaintiff can support his claim that the defendant by its affirmative act instigated and facilitated the condemnation proceedings and the consequent eviction, then in my view the plaintiff has presented a cause of action for breach of the covenant of quiet enjoyment. It is no answer that never before has such a cause of action been allowed. It may be that never before has such a set of facts been alleged. And it is the genius of our law, from before the time centuries ago when an 'action on the case' was created, that the courts would seek a way to grant a remedy so as to right a wrong done by one to another. * * * True, the lease by its terms and the law by its rule both recognize that the covenant of quiet enjoyment would not be violated by the city's taking of the property under the power of eminent domain. But the rationale behind the protection to the landlord in that regard is that here is an act of government separate and apart from the wish and cooperation of private parties. And neither the condemnation clause in the lease nor the general rule of law exculpates the landlord where, as claimed in the case at bar, the act of condemnation has been actively incited by the landlord for purposes of its own. If the covenant of quiet enjoyment is to have any force it means at least that the landlord must in good faith do nothing affirmative to deprive the tenant of possession, peaceable enjoyment of which the landlord contracted to assure to the tenant during the term of the lease. And that means, I think, nothing affirmative, not alone openly and directly, but also by subterfuge or indirection. As is generally the case in the law of contracts, supervening impossibility is an excuse for nonperformance provided there is no contributory fault on the part of the promisor. Restatement of the Law, Contracts, Secs.

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457, 458, 460; 3 Williston on Contracts, Rev. Ed. Sec. 891, p. 2526; 6 Williston, Sec. 1939, p. 5433; Sec. 1959, p. 5495. I hold that on this complaint the plaintiff is entitled to prove (if he can) that the covenant of quiet enjoyment was violated by the defendant in this case notwithstanding the taking of the premises by the municipality, because, as alleged in substance by the plaintiff, that taking resulted from the contributory fault of the defendant."

The trial court in this case found as a fact that respondent Clark-Congress had planned and carried out the breaches of the covenant of quiet enjoyment in cooperation with the Government (Finding of Fact 7, App., p. 49 and Conclusion of Law 4, App., p. 56), without awaiting the event of condemnation, which did not occur until *after* several months of demolition, construction, moving and obstruction.[10]

The judgments in this case to award damages against the landlord were thus well-supported by the general common law as well as by Illinois law, which governed the relations between petitioners and respondent Clark-Congress.

The Court of Appeals treated the recent decisions of this Court dealing with federal condemnations but not with breaches of covenants of quiet enjoyment, as "a transcendental body of law outside of any particular State but obligatory within it" (Dissent of Holmes, *J.*, in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 371 (1910)), divesting petitioners of their rights of quiet enjoyment during the several months prior to the condemnation.

10. Indeed both Clark-Congress and the agents of the Government made it plain to the trial judge that they sought by harassing and disturbing the tenants to make condemnation unnecessary as a way of getting the tenants to move out. The wording of the Government's lease clearly shows this plan to use condemnation only as a last resort, if harassment failed. The campaign did eliminate 77 of the 80 tenants, but the special space requirements of the three petitioners prevented them from getting out of the way of the juggernaut before its ultimate power of eminent domain cast them out after the others.

The court did not discuss the Illinois law on the subject, nor acknowledge that any form of evidence would have satisfied it that petitioners were entitled to any relief against respondent Clark-Congress.

Obviously, such disregard of the law of a State violates one of the first principles of jurisprudence in our federal system of government, set forth in section 34 of the Federal Judiciary Act of September 24, 1789, c. 20, and reenacted with minor changes on June 25, 1948, c. 646, § 1, 62 Stat. 944, 28 U. S. C. § 1652, as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Erie R. Co. v. *Tompkins,* 304 U. S. 64 (1938), rehearing denied, 305 U. S. 673 (1938).

Since, as shown above, the immunity of the United States does not extend to those that act in its name, the federal law of eminent domain does not supplant State common law in the relations of petitioners and their former landlord.

IV.

The district court had jurisdiction to grant relief upon petitioners' cross-claims and counter-claim. Petitioners shall not here present the arguments in support of this jurisdiction of the district court in the rare condemnation cases where such claims arise out of the same set of circumstances as the condemnation. The Court of Appeals devoted the bulk of its opinion to this problem, and as we understand its discussion, reached the conclusion that such claims are permissible. Petitioners do not seek a review on this point.

However, the *effect* of the decision below is to deny jurisdiction of such claims in any case, on the ground that

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condemnees may never claim damages by counterclaim or crossclaim from private parties for injuries inflicted upon them in connection with the taking of their property by or for the Government. If the building contractor employed for the remodelling work had destroyed a tenant's typesetting machine with a misdirected sledgehammer, the Court of Appeals would check the law of eminent domain to determine whether the damages were compensable by the sovereign. If the landlord, seeking to make space available to the Government, had employed strong-arm men, one of whom had assaulted and critically injured a tenant, that court would deny a right to claim damages, on the theory that just compensation for the taking of property concerns only the fair cash market value of property taken, and no further or additional amounts can be recovered in the same case, albeit in separate proceedings without a jury, pursuant to Rule 42(b), from anyone connected with the transactions.

We submit that the court below reached the right result in its study of Rule 71A and its relations to others of the Federal Rules of Civil Procedure, but vitiated and emasculated the result when it directed the trial court to grant Clark-Congress' motion to strike the counterclaim and cross-claims in this case. The result, if allowed to stand, is to violate the provisions and the purposes of the Federal Rules of Civil Procedure, and return to the days of circuitous and multiplicitous suits for related claims and demands.

V.

The judgments of which the decision below deprives petitioners were the only tattered vestige of due process which had been accorded them after a long chain of illegal activities whereby petitioners' Government and their landlord had joined forces to deprive them of their property rights.

By reversing those judgments, the lower court has, under the circumstances of this case, become an instrument of denial of due process of law to these petitioners.

Petitioners' leaseholds were taken in peacetime, for use as federal office space outside of the District of Columbia. This is the only case of a leasehold condemnation in peacetime, involving no war powers or emergency conditions, which has come to our attention. The purpose of taking petitioners' lease space was to gain possession under the Government's lease, and not to gain title to the building. Not only was there an absence of any emergency to justify recourse to this procedure, but in this case the Government's *lease* was illegal, the *taking* was illegal, and vacating the condemnation awards was likewise illegal.

The purported authority for the Government's lease was Title 40, U. S. C., § 304c, which contains the following authorization:

> "The Administrator of General Services is authorized to procure space by lease, on such terms and for such period not in excess of five years as he may deem in the public interest, for the housing of any Federal agency or agencies outside of the District of Columbia, * * *."

Under this authority, the General Services Administration leased the Rand McNally building for a period *in excess of five years,*—the lease purported to bind the Government to its provisions for a period of five years and five months. If the Government's option to renew for five years on the same terms is considered (and the Court of Appeals apparently considered it, App., p. 84), the period was for more than ten years. Thus one limitation upon the power to lease the building was violated from the outset.

Additional restrictions relating to the amount of rent that could be paid and the amount that could be spent for

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improvements on leased property contained in § 278 (a) of Title 40, were likewise violated by the GSA in this deal.

The legality of the taking under Section 257 of Title 40 depends first upon whether it was for public use. In this case, the taking was for the purpose of gaining possession under an illegal lease and therefore was itself illegal.

The legality of the taking further depends upon the making of the deposit required by law. Section 258a of Title 40 permits the United States to file a declaration of immediate taking signed by the person "empowered by law to acquire the lands described," which declaration must show the authority for the taking, a description and a plan of the property and a description of the estate or interest taken, and "a statement of the *sum of money estimated by said acquiring authority to be just compensation for the land taken.*"

Only after the deposit of the amount of the estimated compensation stated in the declaration does the title or interest taken vest in the United States. The government's failure to make such a deposit in this case therefore raises a serious doubt as to whether the taking was lawful.

This is a case where property was taken at the beginning of 1952, and 1955 will certainly be over before just compensation shall have been paid. Moreover, this was not an emergency taking, under the War Powers Act or otherwise, compare *City of Oakland* v. *U. S.*, 124 F. 2d 959, 964 (9 Cir., 1942), but a peacetime action under permanent legislation, to provide office space outside of the District of Columbia for one of the old-line bureaus having the least to do directly with the crises of our times,—the Bureau of Public Debt.

There is much authority for the general proposition that provision *in advance* for just compensation is a prerequisite

to a lawful taking by eminent domain at least unless national emergency or dire public necessity requires otherwise. In *Hanson Co.* v. *U. S.*, 261 U. S. 581, 587 (1923) this Court held that an "owner is protected by the rule that title does not pass until compensation has been ascertained and paid, nor a right to the passession until reasonable, certain and adequate provision is made for obtaining just compensation." And in *Seaboard Air Line Ry.* v. *U. S.*, 261 U. S. 299, 305 (1923), it was held that "a necessary condition of the taking is the ascertainment and payment of just compensation."

The statute relied upon in this case provides for a deposit, at the time of taking, of the full estimated value of the property taken. The amount deposited is subject to withdrawal by the condemnee, pending the final determination of the proper amount to be paid.

In this case, however, the government deposited only the value of a small fraction of the property taken,—the estimated value of only six months' occupancy of the space. There might as well have been no deposit at all.

The action of the Court of Appeals, viewed in the setting of the case, denies due process of law and just compensation to petitioners. The following are the most important elements which show the combined effect of the acts of the landlord, the Government, and the Court of Appeals, upon petitioners' legal rights.

1. The illegal lease between the Government and Clark-Congress Corporation made on June 22, 1951 (R. 81-94).

2. The attempt to secure possession of the entire building for the Government by letters of demand disclosing no claim of right (R. 584, 586).

3. The intentional interference with petitioners' oc-

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cupancy and quiet enjoyment for several months before the taking, and the denial of damages therefor against Clark-Congress by the Court of Appeals.

4. The ouster within a six-months period of 77 out of 80 long-term tenants without compensation.

5. The obvious understanding, as evidenced by the June 22, 1951, lease and the testimony, that the Government would be put in full possession of the entire building by January 1, 1952, and the actual physical accomplishment of that fact by joint "cooperative" action as called for in the lease.

6. The agreement that the Government pay 2½ million dollars rent and 2½ million dollars of improvements into the pockets and building of the landlord for possession taken from the tenants.

7. The continued efforts by the Government to prevent any liabilities being imposed on the landlord, by leasing "subject to existing leases," promising to indemnify the landlord by indemnity clauses in the lease, and instituting the condemnation proceedings.

8. The attempt to oust these defendants without even the courtesy of notice or any attempt at fair dealing (R. 12-13).

9. The voluntary dissolution of the landlord corporation on December 27, 1951, immediately after the landlord had completed performance of its understanding with the Government (R. 968-974).

10. The *immediate* taking of petitioners' space, without advance compensation.

11. The failure to deposit a fairly estimated monetary equivalent of the value of the full term of the leaseholds taken from petitioners (R. 11).

12. The combination of the Government and landlord throughout this action to defeat or delay any re-

covery by these petitioners until lengthy litigation has consumed any possible awards.

13. The constant hiding behind the screen of immunity of the sovereign and the Fifth Amendment in a proceeding where no just compensation has been given, and in view of the cost of legal proceedings, none can now possibly be attained by petitioners.

14. The delay of more than a year after filing a notice of appeal before government counsel certified the record to the Court of Appeals.

15. The filing of a brief, *amicus curiae,* in the Court of Appeals by government counsel, opposing the right of condemnees (petitioners here) to recover damages from their landlord (R. 70).

16. The reversal of the condemnation awards by the Court of Appeals although such awards were within the range of the evidence.

17. The reversal of the judgments for damages against the landlord, by ignoring the Findings of Fact and on erroneous legal assumptions.

18. Remanding all five judgments to the trial court without any guidance as to the reasons for the remand, the manner in which a new trial should differ from the first one, or specification of any errors in the original proceedings in the trial court.

19. The tremendous cost of litigation and appeals heretofore, with more expected hereafter, without which petitioners would receive only the pittance originally deposited.

We do not assert that any one of these developments, standing alone, would amount to a denial of just compensation or of due process of law. But the cumulative effect of all of them is to leave petitioners, more than three years after their property was taken, with a negligible part of

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its value accessible to them, and with no hope for a final order authorizing full payment of the entire value for many months, and perhaps years, yet to come.

The erroneous, garbled and confused decision of the Court of Appeals opens a vista of continuous run-arounds for years to come, before a jury can be impanelled which will suit the court's taste and render a verdict which it will uphold on appeal. A worse run-around, from the District Court in Tort Claims proceedings to the Court of Claims and perhaps even to the State courts, appears to be the prospect for the claims against Clark-Congress, with the Statute of Limitations perhaps already run by reason of the voluntary dissolution of that corporation on December 27, 1951.

The Court of Appeals decision, if allowed to stand, will by a smokescreen of meaningless words and innocuous platitudes, sanction and encourage this outrageous pattern which makes a mockery of the phrase "just compensation." As this Court stated in *U. S.* v. *General Motors Corporation*, 323 U. S. 373, pp. 381-382:

> "If such a result be sustained we can see no limit to utilization of such a device; and, if there is none, the amendment's guaranty becomes, not one of just compensation for what is taken, but an instrument of confiscation fictionalizing 'just compensation' into some such concept as the common law idea of a peppercorn in the law of seizin or the later one of 'value received' in that of contractual consideration."

The course of action by the Government and the Court of Appeals having violated petitioners' constitutional rights, the statutes and cases relied upon must be reconsidered and their meaning made clear, as a matter of general public importance, to avoid such results. Resolution by this Court of the issues presented in this case is vital

and cannot await further proceedings below, without further denial of petitioners' rights.

The court below has sanctioned, by its decision, the method of taking under the condemnation power in this case, which is arbitrary and without statutory authorization and imposes on the condemnee a harsh and unjust deprivation of property in obvious violation of the provision for just compensation in the Fifth Amendment to the Constitution. The court has approved a method whereby over five million dollars of federal moneys are paid to the corporate landlord to secure possession of the building under a lease which specifically requires the landlord to breach its contracts with its tenants.

Under the lease between the landlord and the Government (R. 91) the lessor expressly agreed "to cooperate with the Government to secure the cancellation or termination of * * * existing tenancies" and the Government to indemnify the landlord against "all responsibility for all loss, liability or expense arising out of any termination or attempted termination or cancellation or eviction of any existing tenancy or tenant * * * or of any disturbance in any manner whatsoever of the occupation or use of the space in the building or the right to do so by any such existing tenant whether any of the foregoing should result or arise from condemnation or other proceedings or otherwise."

The arrangement provided not only for payment to the landlord of a larger net rental than the landlord was previously receiving from the evicted tenants but also provided for the complete remodeling and modernizing of the landlord's building at Government expense, the installation of new elevators, new heating plant, alternating current and other items involving an expenditure of two and one-half million dollars (See Stipulation, R. 609-10). It is obvious from the lease that to secure these advantages the

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landlord was required, under the lease, to evict all tenants from the building on or about January 1, 1952, regardless of the nonexpiration of the tenants' leases.

VI.

The decision of the Court of Appeals states that Intertype's recovery of just compensation against the Government "must be delayed until it is known whether the Government's occupancy has exhausted the tenant's leasehold" (Opinion, p. 13), citing *United States* v. *Westinghouse Electric & Mfg. Co.*, 339 U. S. 261 (1950). This an improper extension of the *Westinghouse* decision deferring the award of just compensation or a part thereof for five-years after the original taking. It also totally disregards, and abrogates the stipulation (R. 108-9) that the award should be based on the taking of the entire balance of Intertype's ten-year term, a solemn stipulation made by the Government attorney only after consultation with his superiors in Chicago and in Washington. We do not know of any rule which permits the Government to renege on a stipulation duly authorized and solemnly made. This decision by the Court of Appeals is manifestly an abrogation of the rights guaranteed by the Fifth Amendment and a complete departure from all reasonable principles of justice and fair play.

Moreover, the very moving costs on which the reversal of all of the judgments was predicated, were introduced by the Government (R. 322), as its Exhibits 22, 23 and 24 (R. 577-9). Subsequently, the instructions given the jury, which the court below termed "blurred" and "insufficient", were agreed to by government counsel during the trial (R. 466, 476-7, 485, 511).

Petitioners are thus crushed between the upper millstone of the Court of Appeals and the nether millstone of the conduct and stipulations of government counsel during the

trial. Such a procedure is in itself a departure from proper judicial procedures, calling for the exercise of this Court's supervisory authority.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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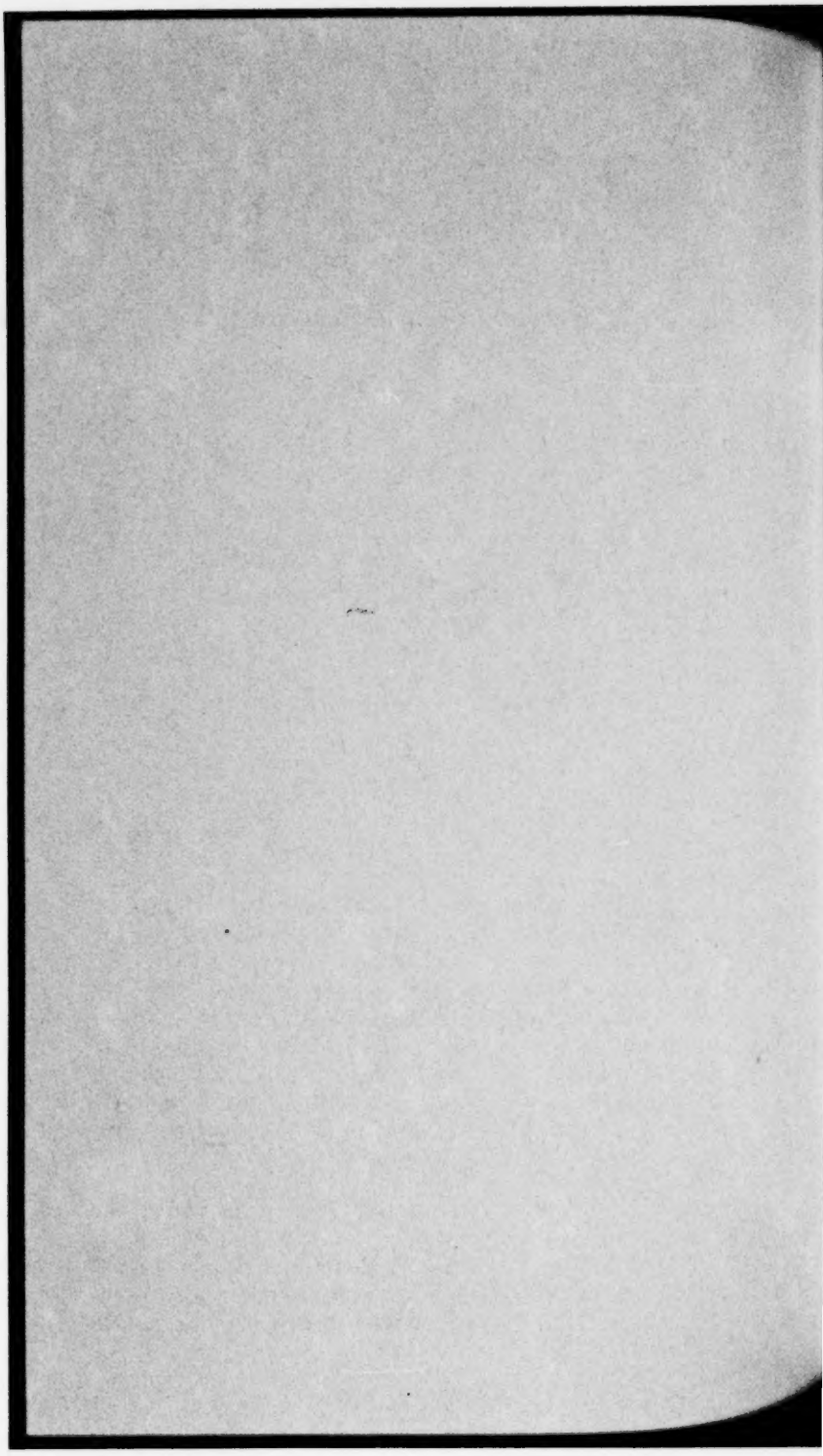
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April 15, 1955.

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APPENDIX.

I. Statutes and Rules Involved.

Statutes.

Title 40, U. S. C.

"§304c. Leasing Additional space; assignment to agency; payment.

"The Administrator of General Services is authorized to procure space by lease, on such terms and for such period not in excess of five years as he may deem in the public interest, for the housing of any Federal agency or agencies outside of the District of Columbia, except the Post Office Department, and to assign and reassign such space. To the extent that the appropriations of the General Services Administration not otherwise required are inadequate therefor, the Administrator of General Services may require each Federal agency to which leased space has been assigned to pay promptly by check to the Administrator of General Services out of its available appropriations, either in advance or during occupancy of such space, all or part of the estimated cost of rent, repairs, alterations, maintenance, operation, and moving: *Provided*, That when space in a building is occupied by two or more agencies, the Administrator of General Services shall determine and equitably apportion rental, operation, and other charges on the basis of the total amount of space so leased. Aug. 27, 1935, c. 744 §3, 49 Stat. 886; July 18, 1940, c. 635, §3, 54 Stat. 765; June 14, 1946, c. 404, §4, 60 Stat. 257; June 30, 1949, c. 288, Title I, §103, 63 Stat. 380."

"§ 257. Condemnation of realty for sites and other uses.

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate

for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice. Aug. 1, 1888, c. 728, § 1, 25 Stat. 357; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 6, 62 Stat. 986."

"§258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons en-

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titled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, §1, 46 Stat. 1421."

Federal Rules of Civil Procedure.

"Rule 52. Findings by the Court.

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b)."

"Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

"Rule 71A. Condemnation of Property.

"(a) The Rules of Civil Procedure for the United States District Courts govern procedure for the condemnation of real and personal property under the

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power of eminent domain except as otherwise provided in this rule."

* * * * *

"(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objections or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed."

"Rule 18. Joinder of Claims and Remedies.

"(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counter-claim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied."

"Rule 13. Counterclaim and Cross-Claim.

"(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any

opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

"(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

* * * * *

"(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

* * * * *

"(i) Separate Trials; Separate Judgment. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of."

"Rule 42.

"(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

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II. Findings of Fact and Conclusions of Law Entered by the United States District Court for the Northern District of Illinois, Eastern Division, on June 25, 1953.

A. *Findings of Fact* (R. 1077-1084).

FINDINGS OF FACT.

1. Merchants Matrix Cut Syndicate, Inc., was, on June 22, 1951, in lawful and peaceable possession of approximately 10,000 square feet of space on the eighth floor of the Rand McNally Building, 536-538 South Clark Street, Chicago, Illinois, under and by virtue of two certain leases, one from Rand McNally & Company, dated May 19, 1949, for a period beginning on June 16, 1949, and ending August 31, 1953, and the other from Clark-Congress Corporation, dated April 27, 1951, for a period commencing May 1, 1951, and ending August 31, 1953.

Intertype Corporation was on June 22, 1951, in lawful and peaceable possession of approximately 10,742 square feet of space on the tenth floor of said Rand McNally Building under and by virtue of a ten-year lease from Rand McNally & Company, dated November 19, 1948, for a term commencing January 1, 1949, and expiring December 31, 1958.

The Advertising Checking Bureau, Inc., was, on June 22, 1951, in lawful and peaceable possession of approximately 20,000 square feet of space, comprising the south half of the eighth floor of said Rand McNally Building under a lease from Clark-Congress Corporation dated February 10, 1950, for a term of five years, commencing on May 1, 1950, and expiring on April 30, 1955.

2. Clark-Congress Corporation, having on June 30, 1949, acquired the landlord's interests in the Merchants Matrix Cut Syndicate, Inc., lease dated May 19, 1949, and

in the Intertype Corporation lease, occupied the position of landlord with respect to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., under each and all of the aforesaid leases during the period here in controversy.

3. Clark-Congress Corporation on June 22, 1951, entered into a written lease with the United States of America, acting by and through the General Services Administration, in form and substance as contained in a certain exhibit variously referred to as Cross-Claimants' Exhibit 2 and Intertype's Exhibit 1.

4. Following the execution of said lease, Clark-Congress Corporation between the period from June 22, 1951, and to and including December 31, 1951, permitted the United States Government, the General Services Administration, and their employees, agents, and servants, including contractors, subcontractors and laborers engaged in remodeling of the building, free and unlimited access to the building and acquiesced in and permitted such persons to knock down walls, tear out partitions, create dust, noise and disturbance throughout the building, usurp and interfere with elevator service, toilets, corridors and other services used by the tenants, interfere with and interrupt electrical, steam, and other utilities furnishing light and power to tenants, and by correspondence and unlawful demands for possession to harass and disturb tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., and generally to interfere with and disturb the orderly and normal operation of the building which the tenants in possession were entitled to under their leases then in force.

5. Clark-Congress Corporation, its employees and agents, were in control of the building during said period from June 22, 1951, to December 31, 1951, were in the building constantly or at frequent intervals, and knew, or must

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be deemed to have known, what was occurring by reason of the Government's actions, and indeed acquiesced in and participated in a concerted effort to force or induce the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., to vacate or abandon the building and to surrender their leases, notwithstanding the fact that said leases were in full force and effect and that the Merchants Matrix Cut Syndicate leases had approximately two years to run, the Intertype Corporation lease had more than seven years to run, and The Advertising Checking Bureau, Inc., lease nearly four years to run.

6. Clark-Congress Corporation in fact co-operated with the United States Government and the General Services Administration to secure cancellations and terminations of leases in accordance with the provisions of its lease of June 22, 1951.

7. It is apparent from the evidence and the lease of June 22, 1951, that a definite and wilful plan and intention existed and was carried out by the joint and combined efforts of Clark-Congress Corporation, the United States Government, the General Services Administration, and their respective employees, agents and servants to rid the Rand McNally Building of all or substantially all tenants as soon as possible after June 22, 1951 to secure possession of the space occupied, respectively, by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., prior to January 1, 1952, and to secure substantially complete possession of the entire building for the Government on or about January 1, 1952, in so far as their combined efforts could bring this about.

8. It is apparent from the provisions of the lease and from the evidence in this case that the president of Clark-Congress Corporation knew or must be held to have known

the nature and extent of the alteration work that was to be undertaken in the building at the time the lease of June 22, 1951, was entered into, and that he also knew or must be held to have known that the Bureau of Public Debt wanted occupancy of the entire building as soon as possible.

9. It is apparent from the provisions of the lease of June 22, 1951, and from the evidence in this case, that Clark-Congress Corporation, its agents, employees and servants knew, or must be held to have known the nature and extent of the alterations and reconstruction that were being undertaken in the building between the period from October 3, 1951, to December 31, 1951, and thereafter, and that Clark-Congress Corporation, its servants and agents, acquiesced in, sanctioned, condoned and consented to the actions of the Government, its employees and servants, in their operation in the building.

10. Except for the collaboration and co-operation of Clark-Congress Corporation in entering into the lease of June 22, 1951, and thereafter in negotiating with other tenants of the building for and procuring the cancellation and termination of various valid leases, the Government would not have been in position to commence and carry on alterations and reconstruction of the building in October, November and December of 1951, in the manner shown by the evidence; that such alterations and reconstruction resulted in creating excessive dust, noise, and other disturbances, interference with the elevator, electrical, steam and other services, obstruction of corridors and of the courtway and loading facilities of the Rand McNally Building.

11. The failure of Clark-Congress Corporation to interfere with, complain about, or protect the tenants against, the actions of the Government in the alteration and reconstruction work, and the letters from the General Services Administration demanding that the tenants, including

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Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., remove from the building, was a breach of the landlord's duty of furnishing to its tenants under continuing leases protection against interference and disturbance by third parties of their tenancies.

12. Clark-Congress Corporation, in accordance with the terms of its lease to the Government, did certain acts of its own to interfere with the tenancy of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., including curtailment of services and letting the Government tear down walls in spaces as to which Clark-Congress was still the landlord, and also co-operated with the General Services Administration in encouraging and permitting undue interference with the tenancies of said three tenants, and authorized and ratified certain acts done by the General Services Administration in alteration and reconstruction of the building, and in all of these actions was a joint tortfeasor with the General Services Administration.

13. Clark-Congress Corporation did nothing to check or stop the interference with the tenancies of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., and must be deemed to have co-operated therein as provided in the lease and to this extent likewise breached its duties of quiet enjoyment to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc. and other tenants in possession.

14. In connection with this co-operative effort, to rid the building of its tenants it was contemplated, as shown by the lease of June 22, 1951, that if necessary the Government would use its powers of eminent domain as against recalcitrant tenants and Clark-Congress Corporation, in signing said lease, authorized and acquiesced in the use of

condemnation proceedings against its tenants if such was necessary to secure actual possession.

15. The acts of Clark-Congress Corporation and of the United States of America in the Rand McNally Building, during the period from June 22, 1951, to December 31, 1951, were far above and beyond the usual and ordinary remodeling that customarily goes on in a building of this type, and did in fact harass, disturb and interfere materially and abnormally with existing tenancies and with the use and occupancy of their spaces by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., and created great noise, dust, confusion, uncertainty and unrest among the employees of said tenants, as well as very material disturbance of said tenants' comfort and business.

The excessive dust, noise, and other disturbances, interference with the elevator, electrical, steam and other services, obstruction of corridors and of the courtway and loading facilities of the building caused by the alteration and reconstruction of the building during the months of October, November and December, 1951, disturbed Merchants Matrix and its possession of the premises under lease to it and rendered the premises unfit for occupancy for the purposes for which Merchants Matrix had leased and occupied them and deprived Merchants Matrix of the beneficial enjoyment of the premises by unduly interfering with its normal business operations and caused Merchants Matrix to abandon the premises. The nature of the business carried on by Merchants Matrix on its premises in the Rand McNally Building and the facilities required to operate its business were such that Merchants Matrix was unable to find rental quarters providing adequate facilities to which to move, and that Merchants Matrix moved out of said Rand McNally Building as soon as the partially completed factory building purchased by it, when

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it was forced to abandon its space in the Rand McNally Building, was completed, and that said moving was within a reasonable time of the disturbance of its possession and enjoyment of the premises.

A hole was knocked through the walls of Intertype's space while it was in lawful possession thereof during the process of demolition of adjoining space.

Some of the demolition work done during this period was in the space adjoining the space occupied by The Advertising Checking Bureau, Inc., and in space on the ninth floor directly above the space occupied by The Advertising Checking Bureau, Inc. The noise caused by such demolition work was so great that often it was necessary for officers and employes of this tenant to discontinue telephone conversations and advise the caller that the person talking would call back when the noise lessened. This noise also made it impossible for this tenant to use Ediphone dictating machines in its space. As of November 10, 1951, the position of The Advertising Checking Bureau, Inc., as a tenant in the space occupied by it became intolerable, and on that day it determined that its rights as a tenant were being disregarded, and it decided to remove from the Rand McNally Building as soon as possible. In implementation of that decision, it immediately (a) negotiated for and obtained office space in Columbus, Ohio, and removed a portion of the files from the Chicago office to the Columbus office, and (b) stepped up its efforts to purchase the William Building located at 205 West Monroe Street, Chicago, Illinois.

16. As a result of the foregoing, Merchants Matrix Cut Syndicate, Inc., has suffered actual damages in the amount of $44,027.91, as follows:

Cost of moving machinery and equipment, office furniture, etc., including cost of breaking wall	$ 9,877.88

Cost of electrical work in moving and relocation	14,649.62
Cost of pipe fitting work in moving and relocation	5,094.94
Cost re electric typewriters	302.27
Cost of parts and conversion of Lake Erie Presses	3,443.00
Value of air conditioning equipment and lighting fixtures destroyed	3,070.26
Extra overtime paid due to interferences with possession and moving	7,589.94
Total damages	$44,027.91

As a result of the foregoing, Intertype Corporation has suffered actual damages in the sum of $41,498.98, as follows:

Cost of moving out	$16,141.05
Compensation to executives for special work during moving	2,103.00
Salary of employees engaged in removal	6,641.55
Loss of profits during the two week period when business was suspended because of moving	16,500.00
Miscellaneous out-of-pocket expense	113.38
	$41,498.98

As a result of the foregoing, The Advertising Checking Bureau, Inc., has suffered actual damages in the sum of $96,949.78, as follows:

Cost of moving machinery, equipment, office furniture, supplies and electrical work	$16,653.61
Extra overtime cost due to moving	1,169.73
Time lost on over-all help	562.50
Cost of carpenter work and materials	1,388.92
Cost of reprinting envelopes, new die cuts and new printed forms	3,355.24
Miscellaneous cash expenses in connection with moving	62.75

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Losses incurred or additional expenses suffered by removing to new location as follows: Additional cost of truck operation 1½ hours per day at $3.00 per hour for man and truck, 300 days per year for 3 years, 1 month, 20 days	4,237.50
Additional cost because of lack of parking facilities at 18 S. Michigan Ave., $20 per month for 3 years, 1 month, 20 days	753.33
Additional cost of handling extra requests caused by later pickup of incoming express and earlier cutoff on outgoing mail and express, 1800 hours per year at $1.25 per hour, for 3 years, 1 month, 20 days ..	7,062.50
Cost of toilet paper, $120 per year for 3 years, 1 month, 20 days	376.67
Cost of window cleaning, $12 per month to January 1, 1953, and $14 per month after January 1, 1953, for 3 years, 1 month, 20 days	443.33
Costs of janitor service, 1 janitor at $46.00 per week and 1 janitor at $30.00 per week for 3 years, 1 month, 20 days	12,404.87
Costs of cutting new stencils, running Mimeograph forms and making changes in advertising plates	280.59
Fair market value of leasehold estate over and above rent reserved, $.717 per square foot, 19,360 square feet, for 3 years, 5 months, 20 days	48,198.24
	$96,949.78

B. *Conclusions of Law* (R. 1085-1088).

CONCLUSIONS OF LAW.

1. The court has jurisdiction of the subject matter of this cause and of the parties hereto.

2. Clark-Congress Corporation, as landlord, owed to Merchants Matrix Cut Syndicate, Inc., Intertype Corpora-

tion and The Advertising Checking Bureau, Inc., as its lessees of certain spaces in the Rand McNally Building, the duty of permitting said tenants to occupy said spaces during the full term of their leases without harassment, annoyance or undue interference with their occupancy and without undue interference or deprivation of the services afforded to them in said premises.

3. While Clark-Congress Corporation, as landlord, had the right and privilege of leasing other space in the building to the Government, or anyone else, subject to the existing leases to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., and subject to existing leases to other tenants, it did not have the right to enter into the lease of June 22, 1951, demising to the Government the actual spaces occupied by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., for a term covered by the terms of the existing leases held by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., on the same spaces.

4. The provision that the Government lease was subject to the Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., leases was not a bona fide provision, and the lease, on its face, clearly shows that, at the time of making thereof, it was contemplated both by the Government and Clark-Congress Corporation that by one means or another the Government would end and terminate the right of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., to occupy their said spaces at the earliest practicable date. The letters sent to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., by the Government fix that date as of November 1, 1951.

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5. Except by the collaboration and co-operation of Clark-Congress Corporation in entering into the lease of June 22, 1951, and thereafter in assisting the Government in the procural of termination of various leases, the Government would not have been in position to harass and press Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., for the spaces lawfully occupied by them respectively under their leases.

6. The cross-defendant Clark-Congress Corporation is charged by law with the natural consequences of its acts.

7. When the landlord (Clark-Congress Corporation) authorizes one tenant (United States of America) to do upon the premises (Rand McNally Building) acts (program of demolition and alteration) whose natural consequences are to injure other tenants (Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc.) there is a constructive eviction.

8. The action of Clark-Congress Corporation, in affording to the Government free and complete access to all parts of the building, to interfere with the elevator service, to alter and eliminate toilet facilities, to interfere with electrical and other services, to eliminate and obstruct corridors and other public parts of the building, was an unlawful breach of the landlord's duty to afford the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., the peaceful and quiet enjoyment of the spaces occupied by the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc.

9. The actions of the Government, the General Services Administration, their employees, agents and servants in the Rand McNally Building during the period from June 22 to

December 31, 1951, and the engagement in the general interior and structural remodeling of the building were acts done under and in pursuance of the authorities given them by virtue of the lease of June 22, 1951, and contemplated by the parties thereto and are by reason of such authority, and the acquiescence of Clark-Congress therein, to be regarded as the acts of Clark-Congress Corporation and it is jointly and severally responsible therefor.

10. The failure of Clark-Congress Corporation to interfere with, complain about, or protect the tenants against the actions of the Government, and the letters from the General Services Administration demanding that the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., remove from the building, was a breach of the landlord's duty of furnishing to its tenants under continuing leases protection against interference and disturbance by third parties to their tenancies.

11. Clark-Congress Corporation, in accordance with its lease to the Government, co-operated with the Government in permitting this interference and, in any event, did nothing to check or stop the interferences and must be deemed to have co-operated therein, as provided in their lease, and to this extent likewise breached its duties of quiet enjoyment to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., and other tenants affected thereby.

12. The action of Clark-Congress Corporation in permitting the Government, its servants and agents, to approach, negotiate with and make demands for possession on tenants having unexpired leases was likewise an interference with the rights of quiet enjoyment of the respective tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc.

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13. Such acts by Clark-Congress Corporation and the Government acting with the sanction, acquiescence and consent of Clark-Congress constitute an affirmative and wrongful breach of duty by Clark-Congress Corporation and entitle Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., and each of them, as tenants of Clark-Congress Corporation under valid and existing leases, to compensation for the damages suffered by them, respectively, as results of these wrongful actions.

14. Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., and each of them, is entitled to recover from Clark-Congress Corporation for all the injury they have sustained by reason of the wrongful acts of Clark-Congress Corporation, including the fair market value of their respective leases as of the date of constructive eviction for the remainder of the term over and above the rent reserved. The date of constructive eviction of The Advertising Checking Bureau, Inc., is November 10, 1951. The fair market value of the lease of The Advertising Checking Bureau, Inc., is found to be in the amount of $48,198.24; the fair market values of the leases of Intertype Corporation and Merchants Matrix Cut Syndicate, Inc., have previously been determined by the jury in this case.

15. The uncontradicted evidence in this case shows that Merchants Matrix Cut Syndicate, Inc., has suffered actual damages in the amount of $44,027.91 by reason of the wrongful acts of Clark-Congress Corporation.

The uncontradicted evidence in this case shows that Intertype Corporation has suffered actual damages in the amount of $41,498.98 by reason of the wrongful acts of Clark-Congress Corporation.

The uncontradicted evidence in this case shows that

The Advertising Checking Bureau, Inc., has suffered actual damages in the amount of $96,949.78 by reason of the wrongful acts of Clark-Congress Corporation.

Enter this 25th day of June, 1953.

John P. Barnes,
Judge.

III. Instructions to the Jury Given by Hon. John P. Barnes, Judge of United States District Court for the Northern District of Illinois, Eastern Division, on January 28, 1953 (R. 549-556).

By the Court: Ladies and Gentlemen of the Jury, you will now be given the law in this case.

You are the sole judges of the credibility of the witnesses. It is your duty to determine where lies the preponderance, that is, the greater weight of evidence in this case. The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, you may take into consideration the number of witnesses testifying to a particular fact or state of facts; and you may also take into consideration, so far as shown by the evidence, the opportunities of the several witnesses for seeing, knowing and understanding the things about which they testify, their apparent intelligence or lack thereof; their appearance, conduct and demeanor while testifying, their interest or lack of interest, if any, as shown by the evidence, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the evidence, facts and circumstances proved on the trial; and from all these facts and circumstances, and from a full

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consideration of all the evidence, determine upon which side is the greater weight or preponderance of the evidence.

Each and all of you have solemnly sworn that you will well and truly ascertain and report just compensation to the owner of the property taken according to the facts in the case as the same might be made to appear from the evidence, and that you would truly report such compensation so ascertained. You may not disregard this oath. It is as binding upon you now as it was then, and you should follow it in reaching your decision.

You should not be swayed by emotion, prejudice, sympathy or any appeals to your feelings. You should not be swayed in any way by the question of the source of the money necessary to pay for the property taken.

Your verdict must be based upon the evidence admitted in this case.

You are instructed that every element of value which would be taken into consideration between private parties in the leasing of property should be considered in a proceeding of this character in arriving at a just compensation for the leaseholds taken, but in so doing the value fixed by the jury must be in accordance with the evidence introduced herein and the instructions of the Court.

It is the duty of the Court to explain to you the issues in this case which you are called upon to determine by your verdict, and to instruct you as to the applicable rules and principles of law by which you must be guided in your deliberation. It is your duty to accept these instructions as correct, and, so far as the law of the case is concerned, be guided by them.

Under the Fifth Amendment to the Constitution of the United States, it is provided that private property shall not be taken for public use without just compensation. You will note that the thing that the private owner is entitled

to when his property is taken for public uses is "just compensation".

The Government of the United States possesses what is known in law as the "power of eminent domain". This means that in the exercise of its lawful powers it has the right to take private property whenever such property is necessary for public use. In the exercise of that power the Government institutes an action which is commonly referred to as a "condemnation proceeding", whereby it acquires title to the property of the individual upon condition that it pay "just compensation" to the owners for the property of which they are deprived.

Private property cannot be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

That equivalent is the market value of the property at the time of the taking. The owner is entitled to be made "pecuniarily whole," that is, to be paid in money, the full value of that of which he has been deprived.

In this particular case the Government in the exercise of its powers of eminent domain has taken for public purposes certain leaseholds in Chicago, Illinois.

You are instructed that the property of the owner that is involved in this case has been taken in eminent domain proceedings by the United States of America for public use, and the right of the Government so to take it is in no way involved in your deliberations. The owners of the property involved are entitled to just compensation for this taking. You are required to determine the fair cash market value of the property at the time of its taking. The controlling date in this case is December 12, 1951. That is the date when the United States Government took the property. You will determine the market value of the property—that is the leaseholds—as of December 12,

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1951. In theory the taking of and payment of just compensation for private property taken for public use are contemporaneous. You shall accordingly in your verdict make no allowance for interest. Allowances for interest will be made by the Court later.

Fair cash market value means the sum of money for which the property could be leased, if offered for leasing, in an open market by an owner, who is ready, willing and able to lease, to a person who is ready, willing and able to rent, for cash or terms equivalent to cash, within a reasonable time, neither of whom is under any compulsion to lease or rent.

In this case one of the measures of the compensation to be made for the taking of the leasehold interests of Merchants Matrix Cut Syndicate, Inc., and Intertype Corporation is the amount which each leasehold estate, or the space respectively occupied by them in the Rand McNally Building, subject to the terms and provisions of each leasehold, would bring in the market at a fair sale, when the lessee, *i. e.*, the tenant, wanted to sell its lease or space and a purchaser wanted to buy it.

Stated in slightly different language, the measure is the market value of the residue of the term yet to run with reference to the most valuable use or uses to which the space may be put; that is, what would be its present money worth over and above the obligations of the lease, to the lessee or an assignee or purchaser willing and able to assume and perform the obligations of the lease for the residue of the term after January 1, 1952.

In determining the just compensation to which Merchants Matrix Cut Syndicate, Inc., is entitled for the taking of its right to the use and occupancy under its lease you may and should take into consideration the excess value, if any, of the use and occupancy of the premises, considering the condition and situation of the property as

it existed at the time of taking for the period from January 1, 1952 to August 31, 1953, over and above the rental reserved in the lease for that period.

In determining the just compensation to which Intertype Corporation is entitled for the taking of its right to the use and occupancy under its lease, you may and should take into consideration the excess value, if any, of the use and occupancy of the premises, considering the condition and situation of the property as it existed at the time of the taking for the period from January 1, 1952 to December 31, 1958 over and above the rental reserved in the lease for that period.

You are instructed that your view of the premises involved in this case is part of the evidence in this case. In viewing the premises you saw the property as it has been altered by the Government for the Government's use. You will endeavor to eliminate from your view the additions, alterations and repairs which have been made by the Government and to attempt to visualize the property as it was on January 1, 1952.

It has been stipulated and agreed that the just compensation to be awarded in this case to Intertype Corporation shall be on the basis that the balance of the term of the Intertype Corporation lease has been taken in this proceeding. The unexpired term of the Intertype Corporation lease is for the period from January 1, 1952 to December 31, 1958.

The witness, Charles John Stupka, testified to moving cost incurred by Intertype Corporation in the amount of $16,141.05, and additional moving expense of $113.38; salaries of employees engaged in removal, $6,641.55; salary and expenses of executives whose time was required in connection with moving, $2,103.00; loss of profits due to three weeks' stoppage of business, $16,500.00 — a total of $41,498.98.

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You are instructed to disregard all of such expenses as elements in determining the just compensation to which the Intertype Corporation is entitled to by reason of the taking of its leasehold in the Rand McNally Building.

The Jury are further instructed that a leasehold estate such as the lease which Intertype had on space on the tenth floor of the Rand McNally Building is a property interest within the meaning of the Fifth Amendment of the Constitution of the United States which provides that private property shall not be taken for public use without just compensation. That the value of said lease is the value of the right which the tenant Intertype Corporation had to occupy that space during the entire term of the lease in accordance with the provisions of said lease and to carry on its business in that particular location.

The Jury are further instructed that in determining the amount of compensation to be awarded to the defendants Intertype Corporation and Merchants Matrix Cut Syndicate respectively in this case, the value of fixtures and permanent equipment destroyed or depreciated in value by the taking are items for which the respective defendants are entitled to compensation.

The fixtures and equipment such as tenants' trade fixtures are items for which the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. They are property distinct from the right of occupancy and such compensation should be awarded not as a part of but in addition to value of the occupancy as such.

The Jury are further instructed that in considering the value of the leasehold space at the time of the filing of the petition for condemnation, the Jury are entitled to consider the rental being paid by the party taking over the space, namely, the General Services Administration representing the United States Government, and in de-

termining the rental paid by the United States Government, to consider not only the cash rental paid by the Government but also the cost as shown by the evidence in this case to the Government of maintaining, operating, altering and remodeling the Rand McNally Building as such costs comprise a definite part of the value being paid to the landlord, Clark-Congress Corporation, by the United States Government as rental for the space taken from Intertype Corporation.

The present money value of a leasehold interest is the present market value as of December 12, 1951 of the residue of the term yet to run from and after January 1, 1952 as with reference to the most valuable use or uses to which the same may be lawfully put; that is, what would be its money worth as of that date over and above the obligations of the lease to a person willing and able to use said space during the balance of the term of the lease and to perform the obligations of said lease for the residue of the term.

The Jury are further instructed that the Government has taken the private property of defendant, Intertype Corporation, namely its right of use and occupancy of the space occupied by it under its lease for a period expiring December 31, 1958 and is accordingly required to pay to defendant, Intertype Corporation, just compensation for such taking. Just compensation means the full and perfect equivalent in money of the property taken, so as to place this defendant in as good position pecuniarily as it would have occupied if its property had not been taken. The ascertainment of that compensation is not controlled by artificial rules or a general formula, but is measured in various ways depending upon the circumstances of each case. In arriving at your verdict of the amount of just compensation to be paid to defendant Intertype, for the taking, you, the Jury, should give proper consideration to

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all the relevant factors appearing in the evidence presented to you.

The Jury are further instructed that in determining the "just compensation" to be awarded to defendant, Intertype Corporation, the Jury may properly take into consideration all evidence tending to show the actual value of the space, the use and occupancy of which this defendant was entitled for the unexpired period of its lease, namely, until December 31, 1958, and of which use and occupancy it has been deprived by the United States Government. The special value of the right of use and occupancy due to its adaptability for use in Intertype's business operation due to the special facilities supplied by the Rand McNally Building is an element which Intertype, as the owner of the right of use and occupancy, is entitled, under the Fifth Amendment of the United States Constitution, to have considered in determining the amount to be paid to Intertype as just compensation upon the taking by eminent domain.

The Jury are further instructed that the Government has taken the private property of defendant, Merchants Matrix Cut Syndicate, namely its right of use and occupancy of the space occupied by it under its lease for a period expiring August 31, 1953, and is accordingly required to pay to defendant, Merchants Matrix Cut Syndicate, just compensation for such taking. Just compensation means the full and perfect equivalent in money of the property taken, so as to place this defendant in as good position pecuniarily as it would have occupied if its property had not been taken. The ascertainment of that compensation is not controlled by artificial rules or a general formula, but is measured in various ways depending upon the circumstances of each case. In arriving at your verdict of the amount of just compensation to be paid to defend-

ant Merchants, for the taking, you, the Jury, should give proper consideration to all the relevant factors appearing in the evidence presented to you.

The Jury are further instructed that in determining the "just compensation" to be awarded to defendant, Merchants Matrix Cut Syndicate, the jury may properly take into consideration all evidence tending to show the actual value of the space, the use and occupancy of which this defendant was entitled for the unexpired period of its lease, namely until September 1, 1953, and of which use and occupancy it has been deprived by the United States Government. The special value of the right of use and occupancy due to its adaptability for use in Merchants' business operation due to the special facilities supplied by the Rand McNally Building is an element which Merchants, as the owner of the right of use and occupancy, is entitled under the Fifth Amendment of the U. S. Constitution, to have considered in determining the amount to be paid to Merchants as just compensation upon the taking by eminent domain.

The Court further instructs the Jury that the defendant, Merchants Matrix Cut Syndicate is entitled to just compensation for the value of the space, the use and occupancy of which, under its lease in evidence in this case, it has been deprived of by the United States Government.

In determining such value the jury should take into consideration the value to Merchants of the space occupied by it by reason of the facilities provided by the Rand McNally Building as shown by the evidence, including the availability of live steam provided by said building; the 24-hour elevator service furnished by said building; the 250 lbs. per square foot of floor load capacity; the DC current for electrical power and light; and such other facilities as appears from the evidence are furnished by said

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building and that the evidence may show are required in the conduct of the business of Merchants.

The Jury are further instructed that in considering the value of the use and occupancy by defendant Merchants Matrix Cut Syndicate of the space, the use and occupancy of which defendant was entitled under its lease of the premises in evidence at the time of the taking of the space by the Government, the jury are entitled to consider the rental being paid by the party taking over the space, namely the General Services Administration representing the United States Government, and in determining the rental paid by the United States Government, the jury should consider not only the cash rental paid by the Government, but also the cost as shown by the evidence in this case to the Government of maintaining, operating, altering and remodeling the Rand McNally Building, as such costs comprise a definite part of the value being paid to the landlord, Clark-Congress Corporation by the United States Government as rental for the space of Merchants Matrix Cut Syndicate.

The Jury are further instructed that the right to use and occupancy of the space occupied by defendant Merchants Matrix Cut Syndicate, under its lease in evidence in this case of space on the 8th floor of the Rand McNally Building is a property interest within the meaning of the Fifth Amendment of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation to the owner thereof; that the value of such use is the right which the tenant Merchants had to occupy that space during the remaining portion of the period provided in said lease, namely, until September 1, 1953, and to carry on its business in that particular location.

IV. Proceedings in Court of Appeals for the Seventh Circuit, Including Opinion.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, July 29, 1954.

Before

Hon. Philip J. Finnegan, Circuit Judge

Hon. .....

Hon. .....

INTERTYPE CORPORATION, ET AL.,
Cross-Claimant-Appellees,
No. 11018-19-20 *vs.*
CLARK-CONGRESS CORPORATION,
Cross-Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

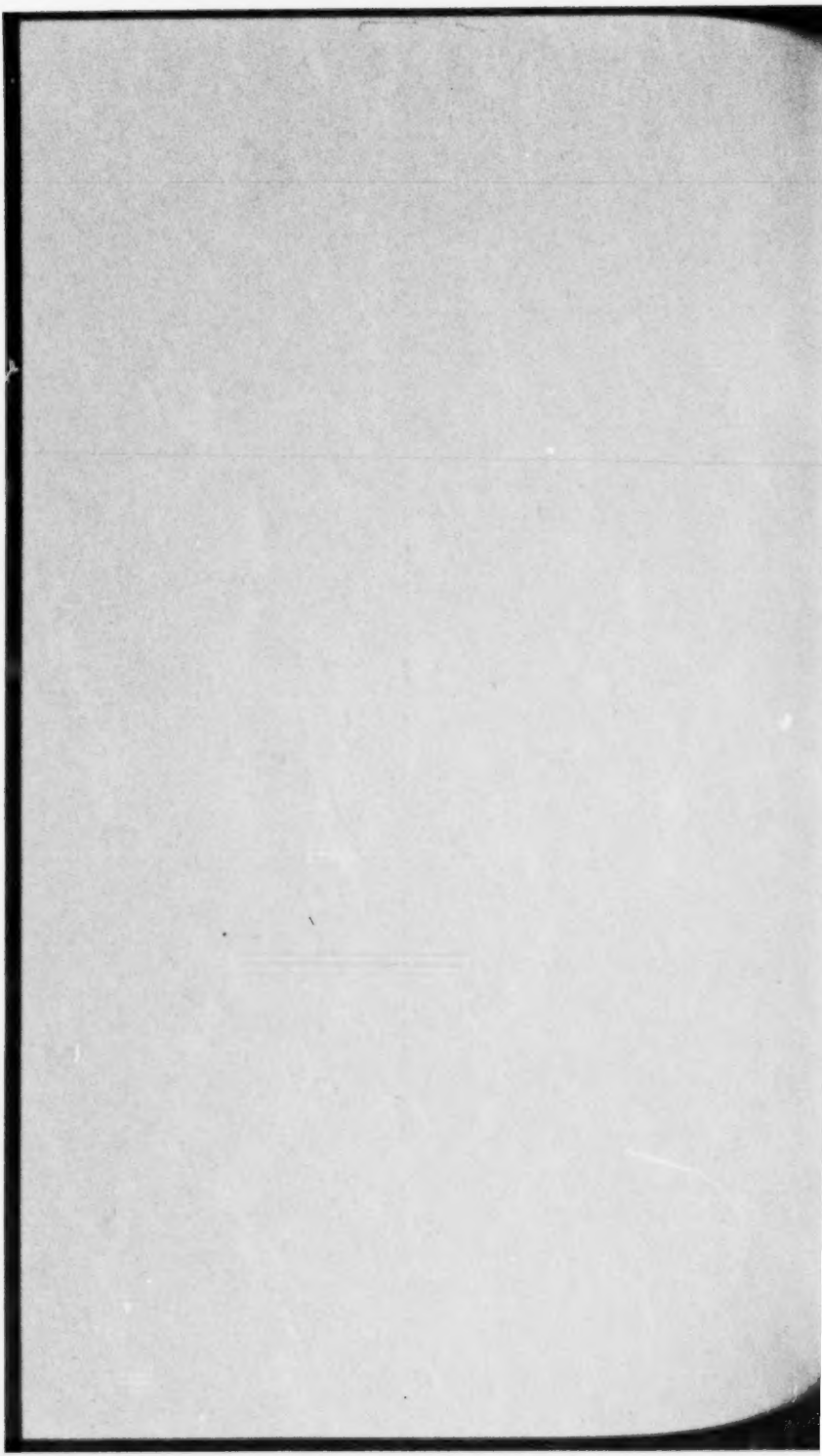
Motion of the United States to file brief as *amicus curiae* and present oral argument at the hearing of these cases is granted.

Cross-claimants-appellees, Intertype Corporation, Merchants Matrix Cut Syndicate, Inc., and The Advertising Checking Bureau, Inc., pursuant to their consolidated motion, are hereby given leave to file their briefs in reply to the aforesaid *amicus curiae* brief, on or before September 9, 1954.

All requests for allocation of, or additional time for oral arguments will be presented to this Court on or before September 9, 1954.

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OPINION BELOW



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IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

OCTOBER TERM AND SESSION, 1954.

No. 11017.
THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.
MERCHANTS MATRIX CUT SYNDICATE, INC., and INTERTYPE CORPORATION,
Cross-Claimants-Appellees.

No. 11018.
INTERTYPE CORPORATION,
Cross-Claimant-Appellee,
vs.
CLARK-CONGRESS CORPORATION,
Cross-Defendant-Appellant.

No. 11019.
MERCHANTS MATRIX CUT SYNDICATE, INC.,
Cross-Claimant-Appellee,
vs.
CLARK-CONGRESS CORPORATION,
Cross-Defendant-Appellant.

No. 11020.
THE ADVERTISING CHECKING BUREAU, INC.,
Cross-Claimant-Appellee,
vs.
CLARK-CONGRESS CORPORATION,
Cross-Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 17, 1955.

Before FINNEGAN, LINDLEY and SWAIM, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Condemnation proceedings[1] involving leasehold interests, are here reviewed under the Government's notice of appeal, and three such notices filed by Clark-Congress Corporation. After judgment was entered, January 29, 1953, on jury verdicts of compensation for taking by eminent domain, the Government moved for a new trial and, in the alternative, for judgment notwithstanding verdicts under Rule 50(b), Fed. R. Civ. Proc., 28 U.S.C.A. Clark-Congress, on the other hand, seeks reversal of a final judgment entered January 26, 1953 against it on two cross-claims and a counterclaim, prosecuted by its three co-defendants. Under these latter three notices of appeal, findings of fact and conclusions of law made by the trial judge, on this aspect of the case, are brought up for our examination.

Prior to any proceedings, now under scrutiny, Clark-Congress acquired five ground leases[2] of land in Chicago, Illinois, on which the Rand McNally Building is situated. Initially, Merchants Matrix Cut Syndicate, Inc., and Intertype Corporation were tenants of the Rand McNally Company for terms hereinafter itemized. Their two leases were assigned June 30, 1949 by that Company to Clark-Congress which, itself, executed other leases with Advertising Checking Bureau, Inc., and Merchants, as follows:

---

1. Authority for this taking was set forth in the complaint, viz: Act of August 1, 1888, 25 Stat. 357 (U. S. C. title 40, sec. 257); Act of August 27, 1935, 49 Stat. 886 (U. S. C. title 40, sec. 304c), as amended by the Act of June 14, 1946, 60 Stat. 257 and the Federal Property and Administrative Services Act of 1949, approved June 30, 1949, 63 Stat. 377, as amended.

2. Clause 12 (T. R. 980) in the lease between Clark-Congress Corporation and the United States of America describes these documents.

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	Area		RAND-McNALLY—Lessor			CLARK-CONGRESS CORP.—Lessor		
			Period			Period		
Defendant	Floor	Sq. feet	Lease Dated	Commencing	Ending	Lease Dated	Commencing	Ending
Merchants:	8th	10,000 Room 844	May 19, 1949	June 16, 1949	Aug. 31, 1953	Apr. 27, 1951	May 1, 1951	Aug. 31, 1953
Advertising:	8th	20,000				Feb. 10, 1950	May 1, 1950	Apr. 30, 1955
Intertype:	10th	10,500	Nov. 19, 1948	Jan. 1, 1949	Dec. 31, 1958			

By its agreement dated June 22, 1951, Clark-Congress leased the entire Rand McNally Building to the United States of America, commencing January 1, 1952, and ending December 31, 1956, subject to extension and earlier termination. Clause 25 of that lease contains, *inter alia,* this wording: "This lease has been entered into by the parties in lieu of condemnation proceedings or an award therein, the Government having indicated that it was considering condemnation proceedings to acquire the rights herein granted to the Government."

At this juncture it is pertinent to parenthetically note that Rule 71A, and the amendment to Rule 81(a), Federal Rules of Civil Procedure, 28 U. S. C. A. became effective August 1, 1951 (341 U. S. 959, 962).

Under its declaration[3] of taking, filed December 12, 1951, coupled with a complaint in condemnation, the Government, pursuant to the request of the Administrator of General Services Administration, sought to acquire the right to use[4] and occupy space in the Rand McNally Building for the housing of federal agencies outside the District of Columbia. Merchants Matrix Cut Syndicate, The Advertising Checking Bureau, Illinois corporations, and Intertype Corporation, a New York corporation, each occupying various areas of the space involved were made parties defendant along with their lessor, Clark-Congress Corporation.[5]

3. For authority, Jess Larson, Administrator of General Services of the United States pleaded the: Act of August 1, 1888, 25 Stat. 357 (U. S. C. Title 40, sec. 257); Act of February 26, 1931, 46 Stat. 1421 (U. S. C. Title 40, secs. 258 (a) to 258 (e)); Act of August 27, 1935, 49 Stat. 886 (U. S. C. Title 40, sec. 304 (c)), as amended by the Act of June 14, 1946, 60 Stat. 257, and the Federal Property and Administrative Services Act of 1949, approved June 30, 1949, 63 Stat. 377, as amended.

4. Pursuant to the Act of August 27, 1935, as amended (U. S. C. title 40, sec. 304c).

5. Cross-claimants' Exhibit No. 1 consists of various documents issued by the Secretary of State of Illinois, concerning the dissolution of this corporate defendant. On December 27, 1951, the Secretary issued a certificate of dissolution.

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By exercising its sovereign power [*Kohl* v. *United States*, 91 U. S. 367 (1875)] of eminent domain, the Government acquired a quantum of interest described in its declaration and complaint, as being: ". . . . the right to use and occupy for a term of years commencing January 1, 1952, and ending December 31, 1956, extendible for an additional five-year term at the election of the United States, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term thereby taken, together with the right to remove within a reasonable time after the expiration of the term or extension thereof any and all improvements and structures placed therein by or for the United States."

After the government moved for an order directing delivery of possession, defendants Merchants and Advertising each filed answers containing cross-claims against their landlord, co-defendant, Clark-Congress; Intertype also answered, but counterclaimed against that co-defendant landlord.

Since appeals numbered 11018, 11019 and 11020 contain a core issue common to all three, stemming from an interpretation of Rule 71A, Fed. R. Civ. Proc., 28 U. S. C. A., following § 2072, we will consider that problem first.

The trial court denied motions to strike the cross-claims and counterclaims interposed by the Government and Clark-Congress Corporation, their challenges to these pleadings being bottomed on a theory of non-conformity with subpart (e) of Rule 71A. Subsequently, Clark-Congress answered both cross-claims and counterclaim and, after a trial on the merits the judgment already mentioned was entered against Clark-Congress. Without a specific interdiction in Rule 71A against cross-claims or counter-claims we must decide if such pleadings may be presented, and claims asserted against co-party defendant Clark-Congress, in this condemnation case.

Rule 71A adopted pursuant to the Supreme Court's or
der,[6] dated April 30, 1951 (341 U. S. 962), abrogated para
graph 7 of Rule 81(a),[7] Federal Rules Civ. Proc., 28 U. S
C. A. "The Rules of Civil Procedure for the United State
District Courts govern the procedure for the condemnatio
of real and personal property under the power of eminen
domain," by the explicit terms of sub-paragraph (a) i
Rule 71A, "*except as otherwise provided in this rule.*"
Its contents are focused upon procedural steps and simpli
fied pleadings, without any mention of either counterclaim
or cross-claim.

This is a rule built upon an area formerly wanting i
uniformity (Report of the Advisory Committee on Federa
Rules of Civil Procedure Recommending Amendments,
F. R. D. 339, 357) and for which no specific provision had
been promulgated in the first set[8] of Rules of Civil Pro
cedure, effective September 16, 1938, 28 U. S. C. A., follow
ing § 723(c).

On June 10, 1947, the Advisory Committee, appointed by
the Supreme Court, reported (7 F.R.D. 503) a preliminary

6. Such rule-making power stems from the Enabling Act. Act
of June 19, 1934, c. 651, §§ 1, 2; 48 Stat. 1064, 28 U. S. C. §§ 723b,
723c.

7. Applicability of Federal Rules of Civil Procedure to con
demnation proceedings, was formerly regulated by this portion of
Rule 81, contained in its subparagraph (7): "In proceedings for
condemnation of property under the power of eminent domain,
these rules govern appeals but are not otherwise applicable."

8. "The Committee * * * drafted a Condemnation Rule which
appeared for the first time as Rule 74 of the April 1937 Draft
* * *" For various reasons "* * * the Advisory Committee in its
Final Report to the Court in November 1937 proposed that all of
Rule 74 be stricken and that the Federal Rules be made applicable
only to appeals in condemnation cases * * * the Committee pro
posed a rule 71A, on the subject of condemnation in its Prelim
inary Draft of May, 1944 * * * the amendments which the Court
adopted in December, 1946 did not deal with condemnation * * *."
7 F. R. D. 503, 512. See also: Report of the Advisory Committee
on Federal Rules of Civil Procedure Recommending Amendments,
5 F. R. D. 339, 357.

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draft of a proposed rule to govern condemnation cases. In their explanatory discussion (ibid, 514) this Committee noted that: ". . . Rule 71A will supply a uniform procedure to be used in all cases of condemnation suits invoking the national power of eminent domain and will supplant those statutes prescribing a different procedure, except where otherwise expressly so stated in the rule. Rule 71A is not intended to and does not supersede the Act of February 26, 1931, C. 307, §§ 1-5 (46 Stat. 1421), 40 U. S. C. §§ 258a-258e, which is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States pending the condemnation proceedings upon a deposit into court."

Simply as indicative of their approach and perspective, we quote several passages from the Advisory Committee's commentary on Rule 71A, contained in their Report and transmitted with that Rule by Chief Justice Vinson to Congress:

> "The purpose of Rule 71A is to provide a uniform procedure for condemnation in the federal district courts, including the District of Columbia. To achieve this purpose Rule 71A prescribes such specialized procedure as is required by condemnation proceedings, *otherwise it utilizes the general framework of the Federal Rules where specific detail is unnecessary.* The adoption of Rule 71A, of course, renders paragraph (7) of Rule 81(a) unnecessary. * * * *" (11 F.R.D. 213, 238, 239). (Emphasis supplied.)
>
> "Since the general standards of pleading are stated in other rules, paragraph (2) (Rule 71A) prescribes only the necessary detail for condemnation proceedings * * * *" (id., 240)
>
> "* * * Departing from the scheme of Rule 12, subdivision (e) (Rule 71A) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The gen-

eral standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth * * *" (id., 241)

"* * * A condemnation action is a proceeding in rem. Commencement of the action as against a defendant by virtue of his joinder pursuant to subdivision (c)(2) is the point of cut off * * *" (id., 242)

Plainly, Rule 71A simply blueprints uniform procedure[9] to be followed for this specific class of case. We are asked to approve adversary litigation among these co-defendants because Rule 71A(a) orders the applicability of "The Rules of Civil Procedure" and Rule 13,[10] thereof, authorizes counterclaims and cross-claims. In its *amicus curiae* brief, the Government[11] attaches such significance to this sentence: "No other pleadings or motion asserting any additional defense or objection shall be allowed," appear-

9. "...in 1931 it was said that there were 269 different methods of judicial procedure in different classes of condemnation cases..." 6 Nichols, Eminent Domain, 294 [§ 27.2(2)] citing the First Report of Judicial Council of Michigan (1931) § 46, pp. 55 ff.

Rule 71A supersedes the Conformity Act, 40 U. S. C. § 258. That statute treated with "practice, pleadings, forms and proceedings and not with matters of substantive laws." *U. S.* v. *243.22 Acres of Land, etc.*, 129 F. 2d 678 (2d Cir., 1942).

10. See e. g. *Douglas* v. *Wisconsin Alumni Research Foundation, et al.*, 81 F. Supp. 167 (N. D. Ill. 1948) on the compulsory counterclaim aspect and *Kauffman* v. *Kebert*, 16 F. R. D. 225 (W. D. Penn. 1954). Judge Lindley, of our court discussed jurisdictional problems stemming from counterclaims in *Carter Oil Co.* v. *Wood*, 30 F. Supp. 875 (E. D. Ill. 1940); *Lesnick* v. *Public Industries Corp.*, 144 F. 2d 968 (2d Cir. 1944).

Governmental Immunity From Counterclaims is treated by a note in 50 Col. L. Rev. 505 (1950); See also: Shulman and Jaegerman, Some Jurisdictional Limitations in Federal Procedure, 45 Yale L. J. 393, 410 (1936); A. M. Dobie, The Federal Rules of Civil Procedure, 25 Col. L. Rev. 261, 267 (1939).

11. Motions to strike parts of the answers, and cross-claims of Merchants and Advertising, and Intertype's counterclaim, were filed by the Government below.

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ing in paragraph (e) of Rule 71A (341 U. S. 959, 966). That sentence comes from the portion of Rule 71A treating with defendant's appearance or answer. If a defendant, in a condemnation proceeding has "any objection or defense to the taking of his property" he must set up such matters in his answer. Merchants, Advertising and Intertype tacked their respective cross-claims and counterclaim to individual answers containing defensive allegations and statements of objections. But we think their asserted claims against Clark-Congress must be viewed and tested independently of any other associated pleadings they filed. For if these three claims are out of place in this condemnation case their status is neither improved nor strengthened by mere incorporation in answers. We are aware of a historical antipathy toward mixing different kinds of actions in one proceeding. Our current view is incompatible with those expressed in *United States* v. *76.15 Acres of Land, More or Less, etc.*, 103 F. Supp. 478 (N. D. Calif. 1952) where cross-claims were rejected in an action for condemnation, because the California court thought the difference between a proceeding *in rem* and one *in personam* warranted such a ruling. But we think that solution rests upon an issue stated with deceptive conceptual simplicity.[12]

12. An interesting sidelight, here, is supplied by this colloquy during Proceedings of the Institute on Federal Rules, July 21 to 23, 1938, upon considerations of Rule 13:

"Mr. J. R. Keaton: * * * Does that mean that if A should sue B for tort, an automobile accident, we will say, that B might come back with a promissory note and adjust that in the same suit?

"Mr. Clark (then Dean, Yale University School of Law, Reporter to the Supreme Court Advisory Committee): It certainly does."

"Mr. Keaton: All of the claims whether involving a contract or tort, can be settled in the same suit?

"Mr. Clark: Yes. * * *"

Speaking of freely filing counterclaims, Dean Clark continued: "* * * Why should you require, for example, that a party should

We have no precise authoritative indication that the Supreme Court, exercising its rule-making power, wished to countenance a determination of such claims, as are now before us, in eminent domain cases, unless it be said that the solution lies in the introductory paragraph (a) to Rule 71A. Cross-claims against co-defendants are so rare in condemnation cases we doubt if such matters were even considered in preparing Rule 71A. Yet, we are confronted with an express direction, in paragraph (a), seemingly giving full play to other Rules of Civil Procedure, "except as otherwise provided" in Rule 71A. Silence of this latter Rule makes it necessary to examine Rule 13 under which Merchants, Advertising and Intertype seek shelter.

At the threshold we record our further awareness that Rule 13 would prevent circuity of actions and multiplicity of suits, indeed these were among the prime reasons stimulating its adoption; practicality, however, is the true taproot of Rule 13. We are cited to *Collier* v. *Harvey*, 179 F. 2d 664 (10th Cir. 1949) where Chief Judge Phillips discussed the broad sweep of Rule 13(g), but not in relation to Rule 71A. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593 (1926) is also brought to our attention for an interpretation of "transaction" announced by the Supreme Court upon examination of former Equity Rule 30, from which Rule 13 was derived. Close scrutiny of facts and circumstances involved in various other opinions relied

---

pay $5,000 on a promissory note when he is sued and is soon going to collect $5,000 on a tort? Why shouldn't you settle it all at one time and have it ended?" Regarding (g) Dean Clark remarked, *inter alia*, "* * * one defendant may make a cross-claim against another defendant. Fed. Rule Civ. Proc. Proceedings of the A. B. A. Inst., Cleveland, 1938, pp. 248 ff.

After Dean Clark's appointment to the Second Circuit Court of Appeals he authored an article entitled Special Problems In Drafting And Interpreting Procedural Codes And Rules, 3 Vand. L. Rev. 493, 497 (1950) in which he ventilates some of the notions to which we refer.

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on by Merchants, Advertising and Intertype show they each fail to bridge the gap between Rule 13 and Rule 71A, especially since Rule 71A was adopted subsequent to the promulgation of Rule 13. Descriptions of attributes and inherent characteristics of Rule 13 furnish little aid in determining if a trial judge hearing eminent domain proceedings has jurisdiction to dispose of co-defendants' cross and counter-claims. Only by inserting a judicial rubric in Rule 71A could we interpret it as containing some lurking prohibition against invoking Rule 13. We read that Rule as it is written.[13] Empirical judgment inclines us away from letting Rule 13 become operative in these proceedings, but we refrain from invading the rule-maker province or from fashioning policy.

By resolving contentions raised against applying Rule 13 to condemnation cases we come to the contents of these three claims and evidence introduced in support of them. Merchants, Intertype and Advertising postulate theories of conspiracy among and between, the Government, General Services Administration and Clark-Congress, as an apparatus for the condemnor to prematurely terminate those three tenancies derived from Clark-Congress, lessor. Cohesive substance for this plot, they allege, is supplied by the June 1951 lease between Clark-Congress and the Government, despite a clause, therein reciting that this lease was in lieu of condemnation. In short, these three claimants are unable to envisage consensual transactions in connection with condemnation proceedings. See: *U. S.* v. *Certain Parcels of Land, etc.*, 345 U. S. 344, 348 (1953); See also: *U. S.* v. *Carmack*, 329 U. S. 230, 243 (1946). But all titles to, and interests in, lands are held subject to the sovereign power of eminent domain. *Goodyear Shoe Ma-*

13. e. g. Chief Judge Biggs held that Rule 52 applied to federal condemnation cases in *United States* v. *Certain Parcels of Land in Philadelphia*, 215 F. 2d 140, 145 (3rd Cir. 1954).

chinery v. *Boston Terminal Co.*, 176 Mass. 115, 57 N. E. 214 (1900). Certainly, the Government's need for quarters shaped itself in obedience to currents other than those flowing from a plot with Clark-Congress. Indeed, these claimants do not go so far behind this taking, by urging a conspiracy to activate the Government power of eminent domain. What they describe equates to an arrangement whereby Clark-Congress leased their spaces, in the Rand-McNally Building, to the Government, so that when the sovereign thus became a co-tenant, with them, it could embark on "a course of harassment, pressure and threats" looking toward compelling these three tenants to abandon or surrender possession. Relying on that pattern, sketched in their pleadings, each claimant urges breaches and violations of covenants of quiet enjoyment and peaceable possession because Clark-Congress, allegedly, ratified, sanctioned and acquiesced in the Governmental acts culminating with instituting this condemnation case. Regardless of how it is articulated each such pleading reverts to, and each is bottomed on, claiming damages because these three tenants had to find quarters elsewhere, and move. Whether the ultimate theory of recovery against Clark-Congress is conveniently blurred in the pleadings or evidence is now beside the mark, since a declaration of taking was filed and processed. Merchants, Intertype and Clark-Congress were entitled to just compensation[14] and no more under U. S. Const. Amend. V. See: *United States* v. *General Mo-*

14. Verdicts of the jury were as follows:

"For the taking of the leasehold estate of Intertype Corporation * * * $131,500.00." "For the taking of the leasehold estate of Merchants Matrix Cut Syndicate, Inc. * * * the sum of $43,750.00."

Our previous opinion, *United States* v. *Advertising Checking Bureau*, 204 F. 2d 770 (7th Cir. 1953), concerned the condemnation clause in Advertising's lease with Clark-Congress and we then held the trial judges ruling, that Advertising was entitled to no award, was correct.

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tors Corp., 323 U. S. 373, 382 (1945). Their interests were acquired by and to the extent of that declaration of taking. 46 Stat. § 1421; 40 U. S. C. §§ 257-258. Consequently their attempts to isolate some fragment of the total acquisition process carries compensation beyond the bounds delineated in the Fifth Amendment. Governmental taking of private property for public use requires payment of just compensation to Merchants, Intertype and ordinarily to Advertising,* but these three tenants cannot improve on the amount of compensation by taking damages from their landlord.[15] It would be a strange index of the compensatory redress for the acquisition of private property through eminent domain proceedings to allow these three tenants recovery from their landlord for moving, packing and other expenses.

Their landlord, Clark-Congress, moved for a new trial pursuant to Rule 59, Fed. R. Civ. Proc., 28 U. S. C. and by appropriate motion under Rule 52(b) Fed. R. Civ. Proc. 28 U. S. C. A., sought to have the trial judge amend his findings of fact; at the same time stating objections to the recorded findings. Both motions were overruled. While the challenged findings are detailed, they are estranged from significant items of evidence disclosed by this record. Of course, we are not now retrying issues of fact nor trenching upon the province allotted a trier of facts below. But we do think that the findings, *inter alia*, which

* This tenant, of course, covenanted away its right to compensation as we hereinafter point out.

15. In his findings of fact, the trial judge, stated that "actual damages" suffered were as follows:

Merchants	$44,027.91
Intertype	41,498.98
Advertising	96,949.78

These damages were awarded to each claimant respectively because "the uncontradicted evidence in this case shows that each claimant suffered the aforesaid actual damages by reason of the wrongful acts of Clark-Congress Corporation," and three separate judgments entered accordingly.

exhibit computations of damages predicated upon the "cost of moving out" of the premises in question, flow from errors of law impairing the three judgments against Clark-Congress. Moving expenses are so inextricably woven into the termination of these leases upon the taking of the Government [*U. S.* v. *Advertising Checking Bureau*, 204 F. 2d 770, 772 (7th Cir. 1953)] that they cannot be recovered indirectly, or on the side.

Various elements itemized by the trial judge in his findings of "actual damage," and underlying the three judgments he entered against Clark-Congress, bear striking resemblance to those which the respondent in *United States* v. *General Motors Corp.*, 323 U. S. 373, 376 (1945) offered to prove on the issue of compensation from the Government. But such costs were not there tendered in support of a claim against a co-defendant landlord in Clark-Congress' position here. Moreover, only Intertype's lease, by its terms, extends beyond December 31, 1956; leases of Merchants and Advertising would have expired prior to that date. At this juncture we might well recall the Government pleading stating that its interest, acquired through condemnation was to be "* * * extendible for an additional five-year term * * *", after December 31, 1956.

Speaking for the majority in *United States* v. *Westinghouse Co.*, 339 U. S. 261, 263-264 (1950), Mr. Justice Frankfurter carefully delimited the holding of *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945) and stated, *inter alia:*

> "When there is an entire taking of a condemnee's property, whether that property represents the interest in a leasehold or a fee, *the expenses of removal or of relocation are not to be included in valuing what is taken.* That rule was found inapplicable to the new situation presented by the *General Motors* case—inapplicable, that is, where what was to be valued was a right of temporary occupancy of a building equipped

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for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use * * *."

Petty Motor (*U. S.* v. *Petty Motor Co.*, 327 U. S. 372 (1946) made clear that the taking of the whole of a tenant's lease does not fall within the *General Motors doctrine* * * *".

Mirrored against these enunciations of basic principles, there emerges strong implications that Merchants, Intertype and Advertising were attempting to recover from Clark-Congress for items not compensable by the sovereign. Advertising was precluded from governmental compensation for the reasons we discussed in *United States* v. *Advertising Checking Bureau, Inc.*, 204 F. 2d 770 (7th Cir. 1953). And, Intertype argues (its brief, 46), as we just said, that such costs were not included in its award. Of course, Intertype's reasoning may explain why it pursues Clark-Congress, but that is hardly legalistic support for such cross-claim. Furthermore, as between Intertype and the Government, "An award based on removal costs will of course be delayed until it is known whether the Government's occupancy has exhausted the tenant's leasehold." *United States* v. *Westinghouse Co.*, 339 U. S. 261, 268 (1950).

All too frequently, profit seeking motives creep into condemnation cases. This observation, no doubt, will be distasteful to those who envisage the public treasury as fair game in such proceedings. Though competitive existence in our society may stimulate such desires, just compensation, only, remains the yardstick in eminent domain proceedings. *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 (1949), 7 ALR 2d 1280. When the Treasurer disburses compensation in obedience to an order of award, based on condemnation proceedings, public dollars stand in lieu of

land, premises or interests, so acquired, and thereafter devoted to public use. "The Constitution and the statutes," Mr. Justice Reed noted, delivering the majority opinion in *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377 (1946), "do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken."

A recital of various other pieces and portions of evidence, disclosed by this record, is unnecessary to this opinion because we think *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *United States* v. *Westinghouse*, 339 U. S. 261 (1950) contain the law applicable to, and determinative of, the major points raised by the Government's appeal in case number 11017. We think those three cited cases are the benchmarks by which the trial court should be guided on this remand.

Since condemnation juries are impaneled only for deciding compensation they commence deliberations in a positive awarding-state-of-mind. An especially delicate equilibrium, acutely sensitive to factors influencing the quantum of award, is present throughout such trials. Perhaps we are underscoring the obvious, but it is our opinion that the jurors' critical and difficult function, here, should not be further complicated by blurred and insufficient instructions or by improper arguments. [See e. g.: *United States* v. *Miller*, 317 U. S. 369, 381 (1943); *Ramming Real Estate Co.* v. *United States*, 122 F. 2d 892 (8th Cir. 1941)] concerning and pointing up deposits made by the Government pursuant to statute.

The judgments in case number 11017, are reversed and remanded to the District Court for a new trial and proceedings consistent with the views expressed in this opinion.

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Each judgment entered on the respective cross-claims of Merchants Matrix Cut Syndicate, Inc., and Advertising Checking Bureau, Inc., and on the counterclaim of Intertype Corporation, being appeals numbered 11018, 11019 and 11020, is hereby reversed and remanded to the District Court with directions to sustain[16] the three motions of Clark-Congress Corporation to strike each cross-claim and the said counterclaim.

Reversed and Remanded with directions.

SWAIM, *C. J.* I concur in the result.

16. Intertype states, in the argument portion, of its brief (p. 17) in Case No. 11018: "In order to protect their rights in the event that the counterclaims and cross-claims should be disallowed in this case, and in order to avoid the running of the statute of limitations both as to filing of claims and the two-year limitation for bringing action against Clark-Congress Corporation which was voluntarily dissolved on December 27, 1951 * * * the defendant tenants have filed similar claims against Clark-Congress Corporation and the Government under the Federal Tort Claims Act as noted at the bottom of page 14 of the Government's * * * brief."

The marginal note in the *amicus curiae* brief filed by the Government in Nos. 11018, 11019, 11020, follows: "Another possible basis for financial interest of the United States in these cases arises from the fact that similar claims have been asserted under the Federal Tort Claims Act and are now pending in the court below. (p. 14.)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois.

Monday, January 17, 1955.

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

The United States of America, *Plaintiff-Appellant,* vs. Merchants Matrix Cut Syndicate, Inc., and Intertype Corporation, *Cross-Claimants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 11017	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said district court for a new trial and proceedings consistent with the views expressed in the opinion of this court filed this day.

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UNITED STATES COURT OF APPEALS

FOR the Seventh Circuit

Chicago 10, Illinois.

Monday, January 17, 1955.

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

Intertype Corporation,
Cross-Claimant-Appellee,
No. 11018 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant;
Merchants Matrix Cut Syndicate, Inc.,
Cross-Claimant-Appellee,
No. 11019 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant;
The Advertising Checking Bureau, Inc.,
Cross-Claimant-Appellee,
No. 11020 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern division.

This cause came on the heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgments of the said district Court

entered on the respective cross-claims of Merchants Matrix Cut Syndicate, Inc., and Advertising Checking Bureau, Inc., and on the counter-claim of Intertype Corporation, being appeals numbered 11018, 11019 and 11020, is hereby reversed, with costs against appellees, and that these causes be, and the same are hereby, remanded to the said District Court with directions to sustain the three motions of Clark-Congress Corporation to strike each cross-claim and the said counterclaim.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois.

Wednesday, February 23, 1955.

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

The United States of America,
Plaintiff-Appellant,
No. 11017 *vs.*
Merchants Matrix Cut Syndicate, Inc., et al.,
Cross-Claimants-Appellees;
Merchants Matrix Cut Syndicate, Inc.,
Cross-Claimant-Appellee,
No. 11019 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant;
The Advertising Checking Bureau, Inc.,
Cross-Claimant-Appellee,
No. 11020 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the petition for a rehearing of this cause be, and the same is hereby, denied.

Office - Supreme Court, U.S.
MAY 27 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY TO BRIEF OF UNITED STATES IN OPPOSITION AND TO BRIEF OF UNITED STATES AS AMICUS CURIAE.

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May 26, 1955.

THE DONNELLEY-GARDEN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 732.

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY TO BRIEF OF UNITED STATES IN OPPOSITION AND TO BRIEF OF UNITED STATES AS AMICUS CURIAE.

The United States has filed two briefs in this cause—one of 26 pages in opposition to the petition for writ of certiorari, and one of 15 pages as *amicus curiae*. In the brief in opposition 16 pages of the 26 pages are devoted to a purported summarization of the record in the trial court under the heading of "statement" and contains numerous inaccuracies and erroneous inferences, which are later used as a basis for the Government's argument. In the brief as *amicus curiae* 6½ pages of the 16 pages are similarly

devoted. The fact that the Government deems it necessary to refer at such great length to the record, rather than to the opinion of the court below, indicates that this Court should take this case on certiorari. The Government apparently feels that the opinion below will not stand on its own merits, and is attempting to bolster it in this strange manner.

In other words, the Government briefs, in referring back to the record of the trial court, rather than to the opinion in the court below, as the basis of its briefs, conclusively points up the fundamental fact that the opinion of the court below was not such an opinion as can stand on its own feet.

Petitioners maintain that it is not good judicial practice for an appellate tribunal to dispose of substantial private and public interests in a manner which leaves the grounds of the decision to conjecture, and especially so where a remand is involved. This Court should take this case in the exercise of its supervisory powers.

The filing of a brief by the United States as *amicus curiae* and the filing of a brief by it in the same capacity in the Court of Appeals are, of themselves, direct admissions of the complicity of the Government and of the truth of the findings of fact entered by the trial court in the cross-claims portion of this case.

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STATEMENT.

The Government's statement of the case in its reply in the condemnation proceeding is of no importance as the sole question is one of the value of the petitioners' leaseholds and the judgments based on the jury verdicts are clearly within the range of the evidence introduced on the trial of this issue.

An analysis of the Government briefs as to the "questions presented" clearly indicates that they do not really contest the jurisdiction of this court, but rather attempt to reargue the merits of the two cases below.

The Government briefs do not controvert the questions raised by the petition for certiorari but seek to convince this court that the trial court was wrong in the handling of this case both on the condemnation and the cross-claims questions.

I.

AMICUS CURIAE BRIEF.

In the *amicus curiae* brief, which relates solely to the claims against Clark-Congress, the Government, at page 2 of its brief, states as follows:

> "(a) the damages to the tenants flowed from the acquisition by the United States, not from the acts of the owners."

This statement of the question assumes facts directly contrary to the findings of fact by the trial court. See finding of fact 15 (Pet. 8, 9, footnote, Pet. App. 52, 53). Both the Clark-Congress brief and the Government brief completely ignore the trial court finding that a constructive eviction had taken place and hence its entire argu-

ment starts from an erroneous assumption of fact directly contrary to the finding of the trial court.

The Government cannot properly make this argument in the absence of a showing that the findings of fact are clearly erroneous. This they have not even attempted to do, nor did the court below.

The second question presented as listed by the Government, at page 2 of its *amicus curiae* brief, is as follows:

> "(b) the damages, being moving expenses are not compensable."

In listing this as a question involved, counsel for the Government fall into the same error as the court below in attempting to apply federal eminent domain cases rather than Illinois law to constructive eviction cases tried and proven against Clark-Congress.

The third and final question presented by the Government *amicus curiae* brief, at page 2 thereof, is as follows:

> "(c) there is no jurisdiction to try such claims in a condemnation proceeding."

To determine this last question presented by the Government, would demand that this Court take this case on certiorari as the court below held to the contrary.

II.

BRIEF IN OPPOSITION.

In the brief in opposition which relates solely to the condemnation case, as listed in that brief at page 2 thereof, counsel for the Government state the questions to be as follows:

> "1. Whether the Court of Appeals correctly reversed the judgment for improper argument to the jury.

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2. Whether the trial court's rulings on the admissibility of evidence and its instructions to the jury constituted reversible error in that they resulted in the application of an erroneous measure of compensation by virtually eliminating 'market value' from consideration and permitting the taking account of special value to the Government and the lessees and of enhancement due to the purpose for which the property was taken."

Question 1 assumes that the reversal of the condemnation judgments in opinion below was based on improper argument of counsel, whereas a reading of the opinion concerning arguments of counsel (Pet. App. 86) discloses that this assumption is incorrect, as the basis of the court's reversal is found in its statement, in the paragraph preceding its reference to arguments of counsel, in which it cites *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *United States* v. *Westinghouse*, 339 U. S. 261 (1950).

In actuality there is no proper basis for the reversal of the condemnation judgments, as an examination of the record in the trial court, including the instructions given by the trial court (Pet. App. 60-69), discloses that the condemnation case was tried entirely within the rules of law contained in those cases, and that the instructions of the trial court were entirely consistent with the law contained in those cases.

Question 2 goes entirely to the merits of the case, makes erroneous assumptions, and is out of place in a proper reply brief as it in no way relates to the opinion of the court below. That the assumption as to an "erroneous measure of compensation" is in error is clearly shown by a reading of the trial court's instructions (Pet. App. 60-9).

ARGUMENT.

The Government's briefs paint the trial court proceeding as unscrupulous and ill conducted—but it ignores the conduct of Government counsel in the trial court and his constant attempts to convey to the jury that petitioners' leases were mere scraps of paper having no value whatsoever. We shall not in this answer attempt to review the individual contentions with respect to the trial itself, the attempt by the Government to oust petitioners without any notice whatsoever (R. 12), nor the consents and agreements of Government counsel to the instructions and evidence now complained of. Possession of the building was what the Government wanted, and possession is what they have gotten, and without payment to your petitioners or the other 77 tenants for their valuable space. The landlord suffered no loss, either in income or possession, but to it have been given all the very material advantages and payments under this deal. The entire transaction should be scrutinized by this court.

The following are typical instances of the confusions raised by the Government's briefs and allegations of matters that were not important in the actual trial:

A. The Government's hiding on appeal behind various clauses in the lease with Clark-Congress which were put into the lease for the very purpose of protecting the Government and Clark-Congress against the rights which they knew the tenants would have if they were browbeaten out of their right of possession (see particularly paragraph 22(b) of the lease, Rec. 91).

B. The attempt to relieve Clark-Congress of liability by the belated institution of the condemnation proceeding

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in order to secure an alleged protection under paragraph 25 of the lease (Rec. 92) which according to the testimony (Rec. 902) was put in the lease for a very different purpose.

C. The representation that the rental to be paid under the Government lease was for office space rather than loft space; whereas, the Government took over the exact space occupied by each of the petitioners on the day of their respective vacation therefrom so that the Government's rental was based on the exact space being taken. They were in fact merely a new tenant in the petitioners' space at an increased rental. What an immediate succeeding tenant would pay for the identical space would seem to be the very best evidence of the value of that space.

D. The statement that the trial court rejected the leases offered by the Government showing space leased at around $1.15 a foot (Opp. Br., pp. 7, 21) without pointing out that these figures and leases were actually given to the jury under the testimony of Jack Witkowski, witness for the Government (Rec. 197).

E. The reference (Opp. Br., p. 24) that Intertype counsel stated that the Government lease would have "tremendous effect on the jury in my favor" when actually that remark (Rec. 461) was made when Intertype counsel consented to the Government, if it so desired, attempting to prove that $47,800 of Government moneys was being wasted on installation of fibre glass draperies on windows throughout the building, including vault space used purely for the storage of defunct and cancelled Government bonds.

F. The inconsistent position taken by the Government in its brief in opposition and its *amicus curiae* brief in seeking to protect itself from either a compensation award or any possible liability under its indemnity to Clark-Congress. The Government's position throughout this

litigation is to force the petitioners into the same unconscionable position as was suffered by the 77 other tenants who were not in a position to resist the Government's scheme of securing full possession of the Rand McNally Building without compensation to any one other than the landlord. Such inconsistencies are apparent in the Government's statement that the Clark-Congress lease was in lieu of a condemnation award and yet their constant reiteration of the statement that part of the nominal deposits made under the declaration of taking were for the benefit of Clark-Congress and not for the sole benefit of the petitioners.

An examination of the record, at page 11, shows that the money deposited was in the total sum of $21,895.00, of which $6,645.00 was deposited for the space occupied by Merchants Matrix, $5,250.00 for the space occupied by Intertype, and $10,000.00 for the space occupied by the Advertising Checking Bureau, and that "the total sum of money estimated by the acquiring authority to be just compensation for that portion of the aforesaid term *commencing January 1, 1952 and ending June 30, 1952*, and hereby taken is $21,895.00" (R. 11), which is the total of the itemized sum above. As each of the Petitioners had a valid lease with Clark-Congress Corporation for a period well beyond June 30, 1952 no part of said deposit could possibly have been made for the interest of Clark-Congress Corporation in said space.

G. The Government has disregarded and repudiated the actions of Government counsel in the trial court and has concealed the fact that the objections of Government counsel to the closing arguments were both infrequent and not addressed to most of the questions now raised, as will be seen by an examination of the record (pp. 518-523, 526-533). Indeed only two very minor objections appear to the closing argument made by counsel for Merchants (Rec.

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534-545) and none at all on the points criticized in the Government's brief in opposition. Neither the opinion below, nor the Government's brief, indicate why the condemnation judgment for Merchants should be in any way affected by the argument of counsel for Intertype.

H. The Government's briefs clearly point up the justice of petitioners' position that the method employed by the Government in securing possession of the Rand McNally Building was not only fundamentally contrary to the basic principles of our Constitution but also in complete violation of all principles of justice and fair play with respect to the rights of the tenants. Nowhere does the Government seek to justify the fact that all of the money paid by the Government for possession of this building has ended up in the pockets of the landlord and not in the pockets of the tenants from whom possession was taken. While castigating your petitioners for not peaceably submitting to the unjust actions of their Government and their landlord, the Government conceals its similar unrecompensed treatment of the 77 other tenants by stating in both briefs that "The building was vacated by all of its tenants except Intertype, Merchants and Advertising" between August and December 1951 (Br. in Opp., p. 4, *amicus curiae* Br., p. 5). Like petitioners, these 77 other tenants were forced to vacate by the combined actions of the Government and the landlord and it is perfectly clear from this record that the Government by largess and recompense induced and required the landlord to cooperate in effecting the prompt evacuation of this building. It was clear to the trial court and to the jury, as it must be to this court if the entire record is reviewed, that the treatment of all tenants in the Rand McNally Building by the Government and the landlord was utterly unscrupulous and contrary to the constitutional rights of these tenants. The entire situation and the conduct of this operation

should be reviewed by this court so that the practice here adopted will not be sanctioned for future use, the rights of citizens will be protected, the condemnation processes not abused and the funds of the Government not diverted into the pockets of others than those from whom the property right has been taken. The Government brief nowhere meets petitioners' argument that they have been deprived of due process of law. The court below in its opinion nowhere makes any reference to market value or to the basis of determining market value or in any way complains that the trial court erred in this respect.

I. The argument in the brief in opposition that more than five years was not leased by the Government in violation of Section 304(c), Title 40 U. S. C., ignores entirely the leasing from August 1, 1951 to January 1, 1952. It was during this period that the constructive evictions took place. It likewise regards the taking of an option as a means of evading the statutory limitation. The Government further admits (Br. in Opp., footnote p. 22) that the Court of Appeals completely overlooked the all-important stipulation (Rec. 108-109) that the taking as to Intertype should be considered the full seven-year balance of Intertype's term.

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CONCLUSION.

There is nothing contained in the Government's brief in opposition to indicate that there is any valid basis of reversal of the condemnation judgments to be found in the opinion of the court below. Rather the long and extended argument from an inaccurately summarized record, indicates directly to the contrary. The Government brief in opposition does not meet petitioner's argument that the trial court on remand has no guide to follow on a retrial, nor any reason to try the case in any other manner than it was tried on the first trial.

Valuation of leaseholds under the market value doctrine developed in fee cases and the application to peace-time taking of the War Powers Act cases, plus arbitrary action between the Government and the landlord to deprive tenants of their rights, should be carefully reviewed by this court in order to establish a fair and feasible means of procedure to protect the constitutional rights of the tenants and to prevent the payment of all compensation into the hands of persons other than those from whom the property interest is taken.

Petitioners assert that the briefs filed by the Government not only do not answer the petition for writ of certiorari, but also demonstrate that it is vital that this court exercise its discretionary right to review the opinion of the court below.

The Government's briefs point up the fact that the failure of the court below to write separate opinions on the condemnation and cross-claims issues which were separately handled in the trial court, resulted in a confused and muddled opinion and reversal of five separate judgments on the basis of reasoning which properly applied to none of the judgments. In other words the court below reversed the cross-claim judgments on the basis of con-

demnation law and reversed the condemnation judgments because of its decision on the counterclaims. Clearly this fundamental confusion by the court below calls for the exercise of this court's supervisory powers.

Respectfully submitted,

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May 26, 1955.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

PETITIONERS' REPLY TO BRIEF OF CLARK-CONGRESS IN OPPOSITION TO PETITION FOR CERTIORARI.

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April 19, 1955.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 732.

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION AND THE ADVERTISING CHECKING BUREAU, INC.,

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UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

PETITIONERS' REPLY TO BRIEF OF CLARK-CONGRESS IN OPPOSITION TO PETITION FOR CERTIORARI.

The Clark-Congress brief does not contest the jurisdiction of this Court, our view of the Questions Presented, nor our view of the importance of those questions to individual rights under the Constitution, to State-Federal relations, and to the proper administration of justice by the federal courts.

This reply, like Clark-Congress' brief, relates only to the claims against Clark-Congress. Neither Clark-Congress nor the Government (which filed no brief in opposition within the time allowed), offers this Court any basis for declin-

ing to review, or affirming by inaction the reversal of the condemnation awards by the Court below. Since the opinion below gave no cogent explanation for reversing those judgments, there appears to be an uncontroverted need for certiorari with respect to that part of this case.

STATEMENT.

The substance of Clark-Congress' position appears to be as follows:

A. It contends that the trial court was mistaken in finding the facts that it found, and assumes facts directly contrary to those found by trial court:

1. It contends that the Government taking of petitioners' property by eminent domain eliminates all proven facts as to Clark-Congress' acts injurious to petitioners.

2. It contends that the trial court ought to have found that Clark-Congress was an innocent victim of the Government's power of eminent domain, whose predicament was similar to that of the petitioners, instead of finding that Clark-Congress was a covenant-breaching, tort-feasing, service-curtailing, profiteering landlord.

3. It contends that the trial court was mistaken in finding that Clark-Congress, in its quest for the riches given it by the lease, aided, abetted and was a co-efficient cause of petitioners' damages, and asserts that the Court of Appeals determined that the eminent domain taking was the only cause of petitioners' injuries.

B. Assuming that the Government was the only cause of petitioners' injuries and Clark-Congress was not involved, the brief in opposition suggests that the Court of Appeals' failure to apply Illinois law is unimportant since

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on those facts Illinois law would not have made Clark-Congress liable for petitioners' injuries.

C. The brief asserts that the Court of Appeals cannot have cloaked Clark-Congress with the immunity of the sovereign since its opinion does not say it is doing so.

D. The brief asserts that a day in court is due process enough for petitioners.

We shall reply to these contentions in the short argument below.

ARGUMENT.

A. Whether Clark-Congress Injured Petitioners Was an Issue of Fact for the Trial Court.

Clark-Congress' brief attempts to persuade this Court that Clark-Congress did nothing which injured petitioners or caused them to move from the Rand McNally Building. The brief is replete with record references and discussion seeking to demonstrate that petitioner's damages were caused entirely by the Government. All of this discussion is based on a tacit assumption that each reviewing court should re-examine all of the facts and reach its independent conclusion as to what caused the injuries complained of. For the reasons stated in the petition, it is clear that neither the Court of Appeals nor this Court should attempt to retry the issues of fact presented in Clark-Congress' brief in opposition. Moreover, reversal with directions to strike the claims was not a proper way for the Court of Appeals to implement any disagreement it may have had with the findings of the District Court.

B. Whether Clark-Congress Was Liable to Petitioners, and the Measure of Their Damages, Were Questions of Illinois Law, Not of Federal Eminent Domain Law.

It is immaterial whether Clark-Congress is right in asserting that Illinois law would not allow recovery against Clark-Congress for wrongs done to petitioners by the Government. Illinois law does allow recovery against a landlord who permits one tenant to remodel and interfere with the quiet enjoyment of premises leased to other tenants,

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and that was the situation here. Clark-Congress goes so far as to contend as a general principle that moving costs cannot be recovered from a landlord as damages for breach of the covenant of quiet enjoyment, neglecting to mention the important factor of proximate causation. Actually, all damages caused by the breach are recoverable under Illinois law. However, the Court need not devote its attention to such questions, for what needs to be decided here is whether the court below should apply Illinois law instead of federal eminent domain law.

Since Illinois law is applicable as shown in the Petition, it is likewise immaterial to assert, as Clark-Congress does, that moving costs are not includable in a tenant's compensation for the value or property taken by the Government. Here, the cause of the moving has been found to be the remodeling and harassment which occurred before the condemnation. The Government's belated taking was employed as a device to accelerate petitioners' departure. Petitioners had searched thoroughly for new quarters and had made preliminary arrangements to move before the taking occurred.

Clark-Congress relies upon the taking as a happy development which erased liability which had already accrued. A condemnation proceeding at the proper time, under this theory, though it cannot wipe out the injuries previously inflicted upon tenants, can exonerate the landlord from all responsibility. Such is not the law, although it is the effect of the decision below.

Reliance upon federal eminent domain cases led the court below into this unjust doctrine. But none of the condemnation cases relied upon dealt with facts like these, where the condemnee had been injured *before* the taking, by events constituting torts and breaches of lease covenants, in which agents of the Government had worked hand in glove with

private parties who were reaping a handsome reward. Clearly, in such a case, the State law applicable to the pre-condemnation events is not rendered inapplicable by the occurrence of condemnation.

C. The Court Below Cloaked Clark-Congress With Sovereign Immunity When It Used Federal Eminent Domain Cases to Measure Clark-Congress' Liability.

If the sovereign were not inherently immune from liability to citizens it would have been unnecessary for the Constitutional Amendment to provide the exception, that the Government must pay just compensation for property taken for public use. Cases interpreting and applying the exception implicitly recognize the general rule of immunity. Therefore, to apply such cases in restricting a landlord's liability is to give him the benefit of the general rule of sovereign immunity. This is what the Court of Appeals did, albeit unwittingly, in the opinion below.

D. Three Years Without Provision for Just Compensation Is Too Many Days, in or Out of Court, to Constitute Due Process of Law.

Petitioners had their day in the District Court, and have not complained of their treatment there as a denial of due process. The petition asserts, however, and we repeat here, that the actions of Clark-Congress jointly with agents of petitioners' co-tenant were a series of grievous wrongs for which the Court of Appeals has denied any remedy; that the subsequent condemnation of petitioners' leaseholds violated the statutes authorizing the acquisition of federal office space outside of the District of Columbia; and that the reversal of the condemnation awards which were within the range of the evidence and the decision to disregard the

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trial court's findings, and to strike petitioners' claims for damages against Clark-Congress, were violations of proper judicial procedures which are a part of due process of law.

Conclusion.

After three years, petitioners have still not been paid, or assured, just compensation for the taking of their business homes by their Government. Such deprivation of Constitutional rights is a matter of general importance, calling for the exercise of the supervisory authority of this Court, and for a clear statement of the law applicable to such proceedings as this.

Moreover, the court below applied federal eminent domain cases instead of Illinois landlord and tenant cases to the claims against Clark-Congress, showing a vital misconception of fundamental legal principles which need now to be restated and applied by this Court.

Respectfully submitted,

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April 19, 1955.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., AND INTERTYPE CORPORATION, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court did not write an opinion. The opinion of the Court of Appeals is reported at 219 F. 2d 90 and appears in the Appendix to the petition, pp. 71–87.[1]

[1] The opinion dealt with four consolidated appeals: one by the United States from a condemnation judgment in favor of petitioners Merchants Matrix Cut Syndicate, Inc., and Intertype Corporation (No. 11017) and three appeals by respondent Clark-Congress Corporation from judgments on cross-claims and a counterclaim in favor of Intertype Corporation (No. 11018), Merchants Matrix Cut Syndicate, Inc. (No. 11019), and The Advertising Checking Bureau, Inc. (No. 11020). The court of appeals entered two judgments (Pet. App. 88–90): one in No. 11017 reversing the judgment against

JURISDICTION

The judgment of the Court of Appeals reversing the condemnation judgment against the United States was entered January 17, 1955 (Pet. App. 88). Petitions for rehearing were denied February 23, 1955 (Pet. App. 91). The petition for a writ of certiorari was filed April 18, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly reversed the judgment for improper argument to the jury.

2. Whether the trial court's rulings on the admissibility of evidence and its instructions to the jury constituted reversible error in that they resulted in the application of an erroneous measure of compensation by virtually eliminating "market value" from consideration and permitting the taking account of special value to the Government and the lessees and of enhancement due to the purpose for which the property was taken.

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the United States, and the other in Nos. 11018–11020 reversing the judgments against Clark-Congress. Petitioners in a single petition seek review of both judgments of the court of appeals. The United States is filing this brief in opposition with respect to review of the judgment in No. 11017, and is filing a separate brief as *amicus curiae* setting forth its reasons why certiorari should not be granted with respect to the judgment entered in Nos. 11018–11020.

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STATEMENT

In 1951, General Services Administration was seeking suitable space in the City of Chicago, Illinois, for use by the Bureau of Public Debt, Treasury Department, and on June 22, 1951, it entered into a lease with Clark-Congress Corporation, owner of the Rand McNally Building in downtown Chicago (R. 81–93). This 10-story combination office and loft building contained approximately 500,000 square feet of usable space (R. 82, 141–142). At the time, at least 80,000 square feet was vacant (R. 81, 145, 152), and the balance was occupied by approximately 80 tenants under leases which ran for varying terms (R. 141). Among these tenants were Intertype Corporation (hereafter called Intertype) which occupied 10,500 square feet under a lease running to December 31, 1958; Merchants Matrix Cut Syndicate, Inc. (hereafter called Merchants) which occupied 10,000 square feet under a lease running to August 31, 1953; and The Advertising Checking Bureau (hereafter called Advertising) which occupied 20,000 square feet under a lease running to April 20, 1955 (Pet. App. 73).

Under its lease, the Government acquired (a) the use of 80,000 square feet of vacant space, and any other blocks of 12,000 square feet or more which later became available, for the period from August 1, 1951, to December 31, 1951, at the rate of $1.33½ per square foot per annum, the lessor to furnish utilities and elevator service,

and (b) the use of the entire building, subject to then existing tenancies, for the term from January 1, 1952, to December 31, 1956, with the option of renewing for an additional five years to December 31, 1961, at a rental of $1.00 per square foot per annum, the Government to pay for all utilities, services, and interior and exterior repairs (R. 81–85). The Government had the right during the term of its lease to make alterations to the building, and reserved the right to remove any improvements which could be removed without damage to the building (R. 85). Subsequently, it expended about $2,500,000.00 in remodeling the building to suit its requirements (R. 609–610).[2] The lease declared that, the Government having indicated that it was considering condemnation proceedings to acquire a leasehold interest, the lease was entered into in lieu of condemnation proceedings or an award therein (R. 92). And Clark-Congress agreed to cooperate with the Government in securing the termination of existing tenancies (R. 91).

On the same day that the lease was executed, the Government advised all tenants by letter that the building was needed for government use (R. 142, 584, 599). From August to December, 1951, the building was vacated by all of its tenants

[2] Contrary to the implication of petitioners' assertions (Pet. 7, 35, 38), the lease did not oblige the Government to expend any amount in remodeling the building (see R. 85).

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except Intertype, Merchants and Advertising (R. 945). On December 12, 1951, the Government filed this condemnation proceeding to acquire the right to use the space occupied by the three remaining tenants for a term from January 1, 1952, to December 31, 1956, extendible for an additional five years at the election of the Government (R. 7–9). On the same day, a declaration of taking was filed, and $21,895.00 was deposited as the estimated just compensation for the use of the space from January 1, 1952, to June 30, 1952, only (R. 9–11).[3] Immediate possession was sought, but the district court permitted Intertype to remain in possession until January 31, 1952, and permitted Merchants and Advertising to remain in possession until May 31, 1952 (R. 35–37).

On September 23, 1952, the district court entered a summary judgment that Advertising was not entitled to any compensation for the taking of the space it occupied because of a condemnation clause in its lease (R. 97).[4] This judgment was

[3] Of the total deposit, $6,645.00 was deposited for space occupied by Merchants, $5,250.00 for space occupied by Intertype, and $10,000.00 for space occupied by Advertising (R. 11). The deposit was made for the "use of the persons entitled thereto" (R. 10), including Clark-Congress, lessor (R. 8), not for the sole benefit of petitioners (see Pet. 11).

[4] Merchants occupied one room in the building (No. 844) under a separate lease which contained a similar condemnation clause Pet. App. 73; R. 64–65). Hence, it was not

affirmed by the Court of Appeals (*United States* v. *Advertising Checking Bureau,* 204 F. 2d 770 (C. A. 7)), and review of it is not sought in this Court. The claims of Intertype and Merchants were tried before a jury in January 1953 (R. 6). The jury returned verdicts of $131,500.00 as just compensation for Intertype and $43,750.00 for Merchants (R. 559–560, 616–617). Judgment was entered upon the verdicts (R. 618–620). The Government's motion for new trial or judgment notwithstanding the verdicts (R. 620–626) was denied on June 25, 1953 (R. 1077), and the Government filed notice of appeal on August 17, 1953 (R. 1122–1123). In its statement of points upon appeal, the Government specified 89 errors on the part of the district court, asserting improper argument to the jury and the application of an erroneous measure of compensation by virtue of incorrect rulings on the admission and rejection of evidence and of faulty instruction of the jury (R. 1125–1129).[5] The proceedings which were the

entitled to and did not receive any compensation for such space.

[5] Petitioners assert (Pet. 36) that there was a "delay of more than a year after filing a notice of appeal before government counsel certified the record to the Court of Appeals." In fact, both the United States and Clark-Congress filed notices of appeal on August 17, 1953 (R. 1122–1123, 1130–1134), and time for docketing the appeals was extended for the full 90-day period as permitted by Rule 73 (g), F. R. C. P. (R. 1137). The clerk of the district court certified the transcript of record on November 10, 1953 (R. 1140), and the record was filed in the Court of

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basis for the major points on the Government's appeal may be summarized as follows:

A former rental agent for the building was the Government's first witness, and during his testimony there were offered in evidence five leases of space in the building comparable in area to petitioners' space. The leases had been executed between February and October, 1950, and called for rentals ranging from $1.03 to $1.18 per square foot (R. 134–138, 149–153). The court sustained objections to this evidence based on the ground that these were only five out of 20 or 25 leases made during the same period (R. 152). The court also suggested that an extraordinary condition prevailed at the time in that there was a large vacancy in the building (R. 152–153). The witness had stated that there was no substantial difference in the building's renting conditions between 1950 and 1951 (R. 137). By way of contrast, over the Government's objection that it was a mere offer and therefore inadmissible, one of petitioners' witnesses was permitted to testify as to a lease negotiated for space in the building in 1949, but never executed (R. 286–287, 591–593).

One of the Government's expert witnesses ex-

Appeals on November 12, 1953 (see cover of printed record in that court), less than 90 days after the appeals were taken. The printed record was not available until June 11, 1954, and thereafter briefs were filed in July and August, 1954. The appeals were heard on September 21, 1954, and a decision rendered on January 17, 1955.

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pressed the opinion that Merchants' lease had no value because fair market rental was $1.30 per square foot, while the actual rent under its lease was $1.58 per square foot (R. 178). He valued Intertype's lease at $7,500.00, being of the view that fair market rental value of its space was $1.25 per square foot as opposed to the actual rent of $1.00 (R. 178–180, 182). His estimates of value took into consideration all the terms of the leases (R. 178–179), including the facts that both leases prohibited assignment without the approval of the lessor, and that Intertype's lease contained a provision for cancellation at the option of the lessor in the event of a sale of the building (R. 62, 566–567). On cross-examination, he stated that the value of Intertype's lease would be $18,000.00 if it were not for the cancellation clause (R. 188). Subsequently, the Government requested an instruction (IX) that the provisions of the leases should be considered by the jury (R. 612–613), and Intertype asked an instruction that the nonassignability clause and the cancellation clause be disregarded (R. 492–494). Although of the opinion that "an assignable lease is worth more than a non-assignable lease" (R. 486) and that the cancellation clause in Intertype's lease affected value (R. 494), the court refused both requests, apparently because of the difficulty of phrasing such an instruction and because the court did not "want to say something

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to the jury that will have them poring over these long printed clauses" (R. 494, 511).

The Government also offered the testimony of an expert witness who had inspected the building in May, 1952 (R. 221). He likewise expressed the opinion that the value of Merchants' space was less than the rent payable under its lease (R. 226–227). Objection was made to his expressing an opinion as to the value of Intertype's space on the ground that he had not seen the space in the condition it was at the time it was occupied (R. 227–228). At this point, the Government's project manager in charge of alterations in the building described the physical condition of the space and identified photographs of it (R. 230–261). The expert's opinion concerning Intertype's space was then re-offered but was excluded (R. 262–263). Immediately thereafter, after considerable discussion, the jury was taken to view the building (R. 263–274), and was later instructed that the view was part of the evidence in the case (R. 552).

Petitioners' first witness was an official of Intertype who was permitted over objection to testify as to the nature of the company's business, the other buildings that had been examined prior to moving into the Rand McNally Building, and other matters indicating a special value to Intertype of the space occupied (R. 274–284). Also over objection, evidence as to Intertype's cost of moving out of the building, the profits lost during

the moving period and other items was admitted (R. 297–307).[6] Likewise admitted through this witness over objection was a group of letters written in the summer and fall of 1951, some by or to government agents and others by or to Clark-Congress or its rental agent, and testimony concerning governmental activity in the building at the time (R. 308–315, 317–319, 599–608).

Petitioners' next witness was Eugene Mulhern who valued Intertype's interest at $52,370.00 (R. 346). This was based on a rental value of $1.87 per square foot which was, in turn, based on an estimate of 35 cents per square foot representing ground rent, taxes, insurance and depreciation (R. 341) plus 96 cents per square foot for cost of operating, i. e., heat, repairs, etc. (R. 342), plus 25 cents per square foot as return on investment (R. 343). His $1.87 figure also included 12 cents per square foot for improvements made by Intertype (R. 346). He valued Merchants' space at $1.75 per square foot (R. 348).

Petitioners' next witness, Gilbert Scribner, valued Intertype's space at $1.75 per square foot (R. 357). During his direct examination, the lease between Clark-Congress and the United

[6] Petitioners assert (Pet. 39) that the evidence of moving costs was introduced by the Government. It is true that on cross-examination of the witness government counsel introduced exhibits showing the detail of the claimed moving expenses and other items (R. 319, 322, 577–579), after the Government's objection had been overruled and much direct testimony introduced on the subject (R. 297–306).

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States was admitted in evidence, over objection (R. 357–358).[7] Also over objection there was admitted a stipulation that the total costs of the alterations to the building by the Government were estimated not to exceed $2,500,000.00, more than two million dollars having been spent by November, 1952 (R. 359–360, 609–610). The stipulation was an agreement as to the fact but not as to the admissibility, competency, relevancy or materiality of the facts as evidence (R. 609). Mr. Scribner computed the rental being paid by the Government at $3.20 to $3.76 per square foot (R. 362). This latter figure was the sum of the basic rent under the lease ($1.00), an amount required to write off the cost of improvements made by the Government during the five-year lease period ($1.15), and an amount ($1.661), derived from average operating costs in 40 Chicago buildings, excluding the costs ordinarily paid by the lessor (R. 361).

For Merchants, its president testified concerning its business needs, etc., and, as in the case of Intertype, correspondence in the summer and fall of 1951 was admitted in evidence over objection (R. 386–409, 584–591). Rebuttal testimony for the Government was given by Mr. Roesing, president of Clark-Congress, whose statements as to the actual operating expenses were stricken after

[7] One of the government experts had previously been cross-examined, over objection, as to the rental provided for in the same lease (R. 198–203).

discussion (R. 434–441, 449–453). At the close of the evidence, it was stipulated that the taking as to Intertype would be treated as involving the entire seven years remaining of its term (R. 108–109). The Government thereupon moved to strike all of the evidence as to moving expenses, etc., but the court stated that it would rather take care of it in the instructions (R. 463–466). A lengthy discussion was then had concerning the parties' proposed instructions (R. 467–511).

In his argument to the jury, counsel for Intertype dwelt at length on the amount of rental the Government was paying (R. 521) and, over objection, asserted that after the term the owner would get back an improved building (R. 522). Applying the government rental, including the operating expenses and amortization of improvements, he reached a total for Intertype's space of $164,810.00 (R. 522). Also, over objection, he relied upon the amount deposited with the declaration of taking, which was for a six-month period from January 1, 1952 (R. 527). He argued that the Government made a deal with Clark-Congress, and that they had said to themselves that Intertype's lease has a cancellation clause on six-months' notice, and that "We will kick them out" (R. 527). This, he said, was the reason the deposit was computed for a six-month period and, applying that figure to the entire remaining term, he arrived at $73,500.00 which, he said, "is what the Government thought our lease was worth"

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(R. 527). Shortly thereafter, he criticized at length the procedure whereby the Government made a lease with Clark-Congress rather than condemning all interests, argued that the Government was paying money to Clark-Congress and that "They are giving us no chance at that money, which we are rightfully entitled to under ordinary condemnation" (R. 529–530). This he referred to as a "nice little trick" and "this jury may or may not let them get away with it" (R. 530).

Counsel for Intertype then referred to the fact that the court would instruct the jury to disregard the figures as to moving expenses, etc., but went on to say that while he couldn't put in the figures the jury knew it costs money and "We have paid out the money it cost us to move—out of pocket—a year ago" (R. 531). Objection was sustained at this point, but there followed the statement that "We will be suffering the disadvantage of having been evicted from there for the whole seven years remaining" (R. 531). Objection to this statement was overruled, as was an objection to a reference immediately following to "inherent loss which is the value of our leasehold" (R. 531–532). Then followed the statement that "There is an inherent loss there, which I can't put before you in dollars and cents, but which has to be reflected in the value of that lease" (R. 532).

After referring to his own witnesses' appraisals of $65,000.00 to $75,000.00, he returned to the subject of the Government's rental which, he said, "our appraisers think is a high figure, what our appraisers, being honest men were not willing to say was the true value of that space" (R. 532). He continued (R. 532–533):

> Now, you ladies and gentlemen, here and I are taxpayers. I am appalled for this reason, or from this standpoint, and you, too. When the five years are up, what happens? Either the Government moves out, leaving all of their improvements, and you and I pay for it; or possibly they exercise their option, stay another five years.
>
> By Mr. BEATTY. Object to this as speculative, and not within the issues of the case.
>
> By Mr. PLATT. I never knew I could not speculate with a jury.
>
> By the COURT. Overruled.
>
> By Mr. PLATT:
>
> But ten years go by. There is no more option. Clark-Congress owns the building. If the Government wants it, it has to condemn again, and give Clark-Congress a second award and pay again for every nickel of the improvements that they put into the place. That is the fair deal these boys are foisting on you and me.
>
> Now, I think that you, in the democratic processes, as counsel mentioned, should put

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a stop as best we can, as best you can, in our little way, to the procedure that has been adopted by the Government here; and the only way we can stay "stop" now is to make it cost them some money; and I am saying the measure of that money should be what they threw into the Clark-Congress pockets for the space they have taken from us.

* * * * *

I have given you several ways. I will give you one more before I stop. The Government took 500,000 square feet, the entire building's usable space, under the terms of their lease. Intertype had 10,700 square feet. Let us say 10,000 square feet, just for ease of my arithmetic. Ten thousand into five hundred thousand. Intertype Corporation had one-fiftieth of the space in that building. The Government is paying five million dollars, if you add the improvements, the rent, and so on, to Clark-Congress. On the general theory of condemnation, we owned one-fiftieth of the space; they paid five million dollars for the whole, and we are entitled to $100,000 on that basis.

So, now, I have given you various reasons why my client, Interytpe Corporation, is entitled to a handsome award in this case, and I think that it will be a lesson to Uncle Sam to take more pains in his method of acquiring property at your and my expense.

Counsel for Merchants likewise referred to the lease to the Government early in his argument, referred to the presence of Clark-Congress in the case and said that the Government "just shoved us out" and has the "effrontery" to produce witnesses that its space "is not worth what we paid for it under our lease" (R. 535–536). He then dealt at length with the development and the nature of Merchants' business, its actions in looking for other space to which to move and argued that "this space had a special value to us for all these reasons" (R. 537–541). Shortly thereafter, he returned to the Government's lease, discussed its provisions and the improvements by the Government and computed the value of Merchants' interest at $30,563.00 (R. 542–544). After emphasizing the unwillingness of Merchants to sell to the Government, he argued that it wanted the space badly enough to pay approximately $30,000.00 and "If it is worth that to them, it is fair compensation we are asking, and that is the amount which we think we should have" (R. 545).

On rebuttal, the court upon objection cut short Government's counsel's explanation that the deposit with the declaration of taking covered the interest of Clark-Congress in the space as well as that of petitioners (R. 546–547).

The instructions to the jury, after defining "fair cash market value" stated that "one of the measures" of compensation was the amount the leasehold estate would bring in the market when

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the lessee wanted to sell its lease and the purchaser wanted to buy it (Pet. App. 63; R. 551). After listing the items of moving expenses, etc., the jury was told "to disregard all of such expenses as elements in determining" Intertype's compensation (Pet. App. 64–65; R. 552–553), but was later told that Intertype was to be placed "in as good position pecuniarily as it would have occupied if its property had not been taken" (Pet. App. 66; R. 554). The jury was also told that it was entitled to consider the rental payable under the lease to the United States including the cost of operating the building and the costs of altering and remodeling it (Pet. App. 65–66; R. 553–554). As to Intertype, the jury was told that it could take into consideration "all evidence tending to show the actual value of the space" and that "the special value of the right of use and occupancy due to its adaptability for use in Intertype's business operation due to the special facilities supplied by the Rand McNally Building is an element which Intertype * * * is entitled" to have considered (Pet. App. 67; R. 554). The same instruction was then given as to Merchants (Pet. App. 67–68; R. 555) and the court then went on to repeat the charge that the rental payable by the Government could be considered (Pet. App. 69; R. 556).

The Court of Appeals reversed the judgment and remanded for a new trial (Pet. App. 88). In doing so it said (Pet. App. 86):

* * * we think *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *United States* v. *Westinghouse*, 339 U. S. 261 (1950) contain the law applicable to, and determinative of, the major points raised by the Government's appeal in case number 11017. We think those three cited cases are the benchmarks by which the trial court should be guided on this remand.

Since condemnation juries are impaneled only for deciding compensation they commence deliberations in a positive awarding-state-of-mind. An especially delicate equilibrium, acutely sensitive to factors influencing the quantum of award, is present throughout such trials. Perhaps we are underscoring the obvious, but it is our opinion that the jurors' critical and difficult function, here, should not be further complicated by blurred and insufficient instructions or by improper arguments. [See e. g.: *United States* v. *Miller*, 317 U. S. 369, 381 (1943); *Ramming Real Estate Co.* v. *United States*, 122 F. 2d 892 (8th Cir. 1941)] concerning and pointing up deposits made by the Government pursuant to statute.

ARGUMENT

1. In seeking review of the Court of Appeals' reversal of the condemnation judgment, petitioners assert (Pet. 20): "Petitioners and the trial judge are left in the dark as to why the Court

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of Appeals has reversed the awards of just compensation based upon the jury verdicts. The 'harmless error' rule (Rule 61, F. R. C. P.) is ignored, and the verdicts set aside with no apparent grounds." This is simply not so. As petitioners are well aware (Pet. 20), the opinion of the Court of Appeals assigned as one of the reasons for reversal the improper argument "concerning and pointing up deposits made by the Government pursuant to statute" (Pet. App. 86). The declaration of taking had not been received in evidence, but over the Government's objection counsel for Intertype was permitted to argue therefrom that the estimate as to just compensation for the space occupied by Intertype was the Government's estimate of the just compensation payable to Intertype, and that, therefore, the much lower valuation by the government expert was not credible (R. 525–527). Inasmuch as the deposit covered the estimated compensation for the interest of Clark-Congress as well as Intertype (R. 8, 11), there was no basis for the argument. But more important, the deposit with a declaration of taking is not a judicial admission by the United States or any evidence of value, and should not be taken into consideration in the determination of just compensation. *Ramming Real Estate Company* v. *United States,* 122 F. 2d 892, 894 (C. A. 8); *Chapman* v. *United States,* 169 F. 2d 641, 644 (C. A. 10); cf. *United States* v. *Miller,* 317 U. S. 369, 381. And the error in the

line of argument was magnified by the refusal to permit government counsel to explain the nature and function of the declaration of taking and the deposit (R. 547). Cf. *Chapman* v. *United States,* 169 F. 2d 641, 644 (C. A. 10). Clearly, this cannot be said to be "harmless" error. Cf. *McCandless* v. *United States,* 298 U. S. 342, 347–348.

The opinion of the court below (Pet. App. 85–86) makes it plain that the court also considered other parts of petitioners' argument to the jury to be improper and prejudicial. And it is obvious from their argument that petitioners' counsel were deliberately attempting to arouse the passions of the jury for the purpose of obtaining a "handsome award" (R. 533; see *supra,* pp. 12–16). There can be no other explanation for such statements as: "They just shoved us out. And then the government has the effrontery to come into court and to produce witnesses who will tell you ladies and gentlemen that that space is not worth what we paid for it under our lease" (R. 536), and, "The money the Government has paid in the form of a new lease, in the form of rental, in the form of taking the operating costs over of the Clark-Congress Building, is already in their pockets, or will be in their pockets after a five-year period. They are giving us no chance at that money, which we are rightfully entitled to under ordinary condemnation. Now, that is a nice little trick, and this jury may or may not let them get away with it" (R. 530). And the argu-

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ment became more prejudicial with such statements as: "I am appalled" (R. 532), "That is the fair deal these boys are foisting on you and me" (R. 533), "the only way we can say 'stop' now is to make it cost them some money" (R. 533), and climactically, "I think that it [a handsome award] will be a lesson to Uncle Sam to take more pains in his method of acquiring property at your and my expense" (R. 533). Even absent the objections which were made here, such argument warrants a reversal. *New York Central R. R. Co.* v. *Johnson,* 279 U. S. 310, 318–319; *City of Fort Worth, Tex.* v. *United States,* 212 F. 2d 474, 477 (C. A. 5).

2. There is also obvious error in such matters as the admission of petitioners' evidence of a mere offer to lease, the rejection of the Government's offer of actual leases, and the admission of testimony as to the Government's lease of the building from Clark-Congress (*supra,* pp. 7, 10–11). In themselves, these matters constituted sufficient grounds for reversal. *Sharp* v. *United States,* 191 U. S. 341, 348–350; *United States* v. *5139.5 Acres of Land, in Aiken and Barnwell Counties,* 200 F. 2d 659, 661–662 (C. A. 4), and cases there cited; *United States* v. *13,255.53 Acres of Land in Burlington and Ocean Counties,* 158 F. 2d 874, 877 (C. A. 3), and cases there cited. But these same matters and other incidents at the trial demonstrate conclusively that the case was tried on the

theory that market rental value was not the onl
measure of compensation, but that the jury shoul
also consider special value to the condemnee an
condemnor and any enhancement due to the Gov
ernment's project (*supra*, pp. 9–17). For ex
ample, petitioners' contention was "Market valu
with reference to lease means very little" (R
481), so that, as the court agreed (R. 494), specia
value to the tenants should be considered as we
as market value. But in *United States* v. *Petty*
Motor Co., 327 U. S. 372, a case where, as here
the entire leaseholds were taken,[8] this Court re
jected a similar contention and held that the con
demnation of all interests in a leasehold should b
treated like the condemnation of all interests i

[8] The interest taken by the Government here was th
right to occupy the space involved for a period from Jan
uary 1, 1952, to December 31, 1956, with the option t
renew for five additional years to December 31, 1961 (R
8). Merchants' lease expired on August 31, 1953 (Pe
App. 73), so that its entire term was definitely taken with
out regard to the option to renew. Intertype's lease ex
pired by its terms on December 1, 1958 (Pet. App. 73), bu
the application of the doctrine of *United States* v. *General*
Motors Corp., 323 U. S. 373, was obviated by a stipulation
that the effect of the taking of the five-year term by th
Government was the total destruction of Intertype's lea
and that it was relieved of all its obligations under it
lease (R. 108–109). The court below apparently over
looked this stipulation in commenting upon the litigation
between Intertype and Clark-Congress (Pet. App. 85
However, petitioners' argument therefrom (Pet. 39)
based upon a misreading of the opinion and is immateria
here. Of course, the Government does not consider th
stipulation as abrogated.

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the fee (327 U. S. at p. 378). Thus, this Court stated in defining just compensation (327 U. S. at p. 377): "This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called 'market value.'" And even in *United States* v. *General Motors Corp.*, 323 U. S. 373, 383, where only a portion of a leasehold was taken, "market value" was adhered to as the measure of compensation. See also *United States* v. *Westinghouse Co.*, 339 U. S. 261, 263–264, 266. Plainly, therefore, the *Petty Motor, General Motors* and *Westinghouse* opinions were not, as petitioners assert (Pet. 19), "scrupulously followed throughout the trial." The failure to do so and the consequent adoption of an erroneous measure of compensation required reversal.

The consideration of the rental in the Government's lease, together with the amount expended by the Government in converting the structure from a loft building to a modern office building, was especially prejudicial, since it is the only evidence that can support the verdicts. As we have shown, *supra*, p. 11, one of petitioners' witnesses estimated that the Government was paying a rental of $3.76 per square foot, including $1.15 per square foot as the amortized cost of the conversion (R. 361–362), and in argument to the jury the evidence was pointed to as supporting an award of $164,810.00 (R. 522). The receipt of any evidence as to rental paid by the Government was erroneous (*United States* v. *13,255.53*

Acres of Land in Burlington and Ocean Counties, 158 F. 2d 874, 877 (C. A. 3), and cases there cited), but the error was compounded here by the fact that the evidence admitted did not relate to the value of the loft space taken from petitioners, but rather to the value of the space in a building which was radically altered and considerably improved by the Government at great expense. Obviously, such evidence violated the fundamental concept of just compensation as the market value of the interest taken ascertained as of the date of taking. *United States* v. *Miller,* 317 U. S. 369, 373–374; *United States* v. *Petty Motor Co.,* 327 U. S. 372, 377. Counsel for Intertype expressed the opinion that such evidence would have a "tremendous effect on the jury in my favor" (R. 461). That it did is conclusively demonstrated by the fact that although, as counsel realized (R. 520, 527), the testimony of his witnesses would justify an award of $56,175.00 at the most and that even the deposit with the declaration of taking could be said to support an award of only $73,500.00, the jury verdict was for $131,500.00 (R. 616).[9] Similarly, although counsel for Merchants analyzed the evidence, including

[9] Thus, petitioners' attempt (Pet. 20) to distinguish the holding in *Ramming Real Estate Co.* v. *United States,* 122 F. 2d 892 (C. A. 8), is without any basis here, since the computation based upon the deposit was higher than any testimony except the also inadmissible evidence as to the rental paid by the Government.

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the rental provided in the government lease, as justifying an award of $30,562.00 (R. 545), the jury verdict for Merchants was in the amount of $43,750.00 (R. 617). Plainly, the court below was fully justified in characterizing the awards in this case as, in effect, a raid upon the Treasury.

3. Petitioners also assert (Pet. 31–34) that the condemnation proceeding was unauthorized and therefore illegal. Since they filed no cross-appeal from the final judgment in condemnation, it does not appear that they have standing to raise such an issue here. Moreover, since the acceptance of this contention would lead only to a reversal with directions for dismissal of the cause instead of for a new trial, the contention is against their interests, unless it is their purpose to look to Clark-Congress alone for their compensation. But in any event, it is clear that the condemnation proceedings were valid for the reasons stated in *United States* v. *Advertising Checking Bureau,* 204 F. 2d 770 (C. A. 7). And the fact that the Act of August 27, 1935, Section 3, 49 Stat. 886, as amended, 40 U. S. C. 304c, prohibits the procuring of space by lease for more than five years does not invalidate the proceeding since the additional period here involved is at the future option of the Government. Cf. *Leiter* v. *United States,* 271 U. S. 204, 206–207. Likewise, the limitations of the Act of June 30, 1932, Section 322, 47 Stat. 412, 40 U. S. C. 278a, are of no relevancy to the claims of these

tenants. Finally, even if the declaration of taking and the deposit of compensation were defective, a conclusion with which we do not agree, the condemnation proceeding would not be vitiated, since the declaration of taking procedure is merely ancillary to a condemnation suit. *Catlin* v. *United States,* 324 U. S. 229, 240.

CONCLUSION

The decision below, remanding for a new trial, is correct. There is no conflict of decisions and no question of general importance is presented. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION AND THE ADVERTISING CHECKING BUREAU, INC., PETITIONERS

v.

CLARK-CONGRESS CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The district court did not write an opinion. Its findings of facts and conclusions of law are set out in the record at pp. 1077–1088 and in the appendix to the petition at pp. 47–60. The opinion of the Court of Appeals (Pet. App. 71–87) is reported at 219 F. 2d 90.

JURISDICTION

The judgment of the Court of Appeals was entered on January 17, 1955 (Pet. App. 89). A petition for rehearing was denied on February

23, 1955 (Pet. App. 91) and the petition for a writ of certiorari was filed on April 18, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, in this proceeding by the United States to condemn space in an office building, the court below correctly held that the owner's motion to strike cross-claims and a counterclaim by its tenants for recovery against the owner should have been sustained because (a) the damages to the tenants flowed from the acquisition by the United States, not from acts of the owner, (b) the damages, being moving expenses, are not compensable and (c) there is no jurisdiction to try such claims in a condemnation proceedings.

STATEMENT

The United States instituted proceedings to condemn for a term of years space in the Rand McNally Building in Chicago, Illinois, to house the Bureau of Public Debt. The defendants were Clark-Congress Corporation, the owner of the building, and petitioners who were tenants for terms less than the term taken [1] (R. 7–9, 108–109). In their answers to the condemnation complaint, petitioners included allegations, designated variously as a "Cross-Claim" and a "Counter-

[1] It was stipulated that Intertype's leasehold, although longer than the term taken by the United States, was totally destroyed by the taking (R. 108–109).

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Claim", seeking recovery against Clark-Congress for damages resulting from loss of their leases (R. 39–42, 44–46, 55–59). A judgment in condemnation was entered awarding just compensation against the United States (R. 618). Judgments were also entered allowing petitioners recovery against Clark-Congress on their cross-claims (R. 1088–1090). The United States and Clark-Congress appealed from the judgments relative to each. In addition, the United States appeared as *amicus curiae* in the Clark-Congress appeals. The Court of Appeals handed down a single opinion and two judgments reversing in both appeals (Pet. App. 71–90). Petitioners have now applied to this Court, in a single petition, for a writ of certiorari to review both judgments below. The Government is filing a brief in opposition with respect to the condemnation judgment to which it is a party. This brief, as *amicus curiae,* relates only to the cross-claims against Clark-Congress.

On June 22, 1951, Clark-Congress executed a lease of the building to the United States (R. 81–93). The lease stated that it was "entered into by the parties in lieu of condemnation proceedings or an award therein, the Government having indicated that it was considering instituting condemnation proceedings to acquire the rights herein granted" and, in the event "that the Government should institute any condemnation proceedings, in order to obtain possession of any premises

hereby demised, it is agreed by and between the parties that this lease agrement may be introduced in evidence as a stipulation between the parties hereto and any award not inconsistent therewith may be entered" (R. 92).

The lease was to commence as to the vacant part of the building on August 1, 1951 (R. 81). Additional space was to be leased to the Government as it became available (R. 82). The entire building was leased from January 1, 1952, to December 31, 1956, subject, however, to then existing tenancies whose rentals should be paid to the Government (R. 82, 88–89). Clark-Congress agreed to cooperate with the Government to secure cancellation or termination of existing tenancies (R. 91). The Government assumed responsibility for any loss, liability or expense resulting from such action (R. 91). Article 24 provided (R. 92):

> It is understood and agreed between the parties that this lease and any premises hereby demised are subject to any and all existing rights of occupancy of tenants under existing leases (including Rand McNally & Company under the new lease) and that the Lessor makes no representations, assumes no responsibility and makes no guarantees whatsoever with respect to the right of the Government to take or acquire possession of any of the demised premises but the Government assumes all responsibility with respect thereto. The Government further

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> assumes all responsibility for any claims or causes of action of any such existing tenants which may arise out of any proceedings or action, whether through condemnation or otherwise, whether against the Lessor or others, to acquire possession of any premises in the building or hereby demised or to terminate or bring to an end any existing tenancies under any existing leases.

Petitioners were notified on the date of the lease that the Government would require their space "at the earliest practical date" (R. 19, 584, 599, 987). Almost all of the tenants in the building vacated in the summer and fall of 1951 and work proceeded on the alterations to suit the needs of the Government. The present proceedings were instituted by complaint (and declaration of taking) filed on December 12, 1951, to condemn the right to use the space occupied by petitioners (R. 7–9). A claim of The Advertising Checking Bureau, Inc., seeking compensation from the United States was rejected on motion for summary judgment because its lease contained a condemnation clause and that judgment was affirmed. *United States* v. *Advertising Checking Bureau, Inc.*, 204 F. 2d 770 (C. A. 7). That decision also rejected the contention that the proceedings were not authorized. Judgment awarding the other two tenants compensation totalling $131,500 for Intertype and $43,750 for Merchants was entered after a jury trial (R. 618). The claim of Clark-

Congress was settled in accordance with the terms of the lease.

Thereafter, petitioners' cross-claims came on for hearing. Motions to strike these portions of the answers were denied (R. 66–69, 94–96). The court's findings contain the following: After the lease to the Government and before the date of taking, Clark-Congress permitted agents of the Government to enter the building and, in making alterations, to create disturbance and interference with the normal operations of the building (Pet. App. 48–49; R. 1078–1079). Except for the collaboration of Clark-Congress, "the Government would not have been in position to commence and carry on alterations and reconstruction of the building in October, November and December of 1951" (Pet. App. 50; R. 1080). The "failure of Clark-Congress Corporation to interfere with, complain about, or protect the tenants against, the actions of the Government in the alteration and reconstruction work, and the letters from the General Services Administration demanding that the tenants * * * remove from the building, was a breach of the landlord's duty of furnishing to its tenants under the continuing leases protection against interference and disturbance by third parties of their tenancies" (Pet. App. 50–51; R. 1080). Finding 14 states (Pet. App. 51–52; R. 1081):

> In connection with this cooperative effort, to rid the building of its tenants it was

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> contemplated, as shown by the lease of June 22, 1951, that if necessary the Government would use its powers of eminent domain as against recalcitrant tenants and Clark-Congress Corporation, in signing said lease, authorized and acquiesced in the use of condemnation proceedings against its tenants if such was necessary to secure actual possession.

The damages were found to be $44,027.91 for Merchants, representing the cost of moving and related items; $41,498.98 for Intertype, composed of the same elements; and $96,949.78 for Advertising which, in addition to similar items of moving costs, included the fair market value of its leasehold above rent reserved (Pet. App. 53–55; R. 1083–1084).

The court concluded that in affording the Government access to the building, etc., there was an unlawful breach of the landlord's duty to accord the tenants quiet enjoyment of their spaces and that the landlord's failure "to interfere with, complain about, or protect the tenants against the actions of the Government, and the letters from the General Services Administration" was a breach of its duties, as was its action in permitting the Government "to approach, negotiate with and make demands for possession on tenants" (Pet. App. 57–58; R. 1086–1087). It stated that when the landlord authorized one tenant to do acts injuring other tenants, there was a con-

structive eviction (Pet. App. 57; R. 1086). The court ruled that each tenant is entitled to recover the amount it was damaged because of those "wrongful acts of Clark-Congress" (Pet. App. 59; R. 1087–1088) and judgments were entered awarding the foregoing amounts (R. 1088–1090).[2]

On appeal by Clark-Congress, the Court of Appeals reversed with directions to sustain the motions to strike petitioners' cross-claims and counterclaim (Pet. App. 87). It held that the lease, rather than being a plot against petitioners, was an appropriate consensual transaction in connection with condemnation proceedings, that petitioners' "attempts to isolate some fragment of the total acquisition process carries compensation beyond the bounds delineated in the Fifth Amendment", and that "these three tenants cannot improve on the amount of compensation by taking

[2] The court said that the damage suffered by each tenant included "the fair market value of their respective leases as of the date of constructive eviction for the remainder of the term over and above the rent reserved" (Pet. App. 59; R. 1087). The date of that "eviction" as to Advertising was held to be November 10, 1951, and it alone was awarded the fair market value mentioned (Pet. App. 59; R. 1087–1088). The court stated that as to the other petitioners those values have previously been awarded by the jury in the condemnation case (Pet. App. 59; R. 1088). No date of "constructive eviction" by Clark-Congress was stated for those petitioners. By orders of the court, contrary to a motion by the Government for immediate possession, Advertising and Merchants were granted possession until May 31, 1952, and Intertype until January 31, 1952 (R. 36–37). Title passed to the Government on December 12, 1951 (R. 9).

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damages from their landlord * * * for moving, packing and other expenses" (Pet. App. 81, 83).

ARGUMENT

This case presents no question calling for review by this Court. There is no conflict of decisions. The decision of the Court of Appeals reversing the judgments of the district court is correct.

Petitioners assert (Pet. 16–18) that the court below exceeded its power in that it set aside the trial court's findings of fact by holding that those findings "are estranged from significant items of evidence" and "flow from errors of law" (Pet. App. 83–84). The significant items of evidence, which establish that the presence of most of the findings resulted from errors of law, are (a) that both the lease, as its terms show, and the condemnation of petitioners' interests were parts of the same total acquisition process by the United States to obtain property for a public purpose and (b) that petitioners' losses, outside the condemnation judgment, are the "costs of moving out."

The court's use of those items, petitioners complain (Pet. 14, 24, 30), erroneously led to applying decisions in eminent domain cases, instead of Illinois landlord-and-tenant law, to their rights with respect to Clark-Congress and thereby cloaked a private-property owner with the immunity of the sovereign. The contention is with-

out merit. The actions causing petitioners' losses were by the United States under the eminent domain power, not by Clark-Congress as landlord. The Government required this building to house the Bureau of Public Debt. It approached the owner, Clark-Congress, to acquire the property by negotiation and agreement. The Government's power to acquire property may be exercised in this manner. Condemnation litigation is not required to bring the transaction within the acquisition process. As the lease shows, the lease agreement was "in lieu of condemnation proceedings or an award therein" (App. 74). Clark-Congress was subsequently a defendant in the condemnation. Petitioners were notified on the date of the lease that the Government would take their space (R. 19, 584, 599, 987). Thus, the lease and subsequent activities were part of the acquisition by the Government which culminated in the condemnation proceedings.

Clark-Congress, like each petitioner, was merely a potential condemnee. The lease constituted a settlement with the building owner as to its claim relating both to empty space and to space occupied by tenants. Sensible administration requires that amicable arrangements be made with as many parties as possible, particularly when the taking involves a building containing numerous tenants. This procedure is customarily followed. See, e. g., *United States* v. *Petty Motor Co.*, 327 U. S. 372, 374; *United States* v. *425,031 Square Feet in*

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Jersey City, 187 F. 2d 798 (C. A. 3); *United States* v. *576.734 Acres of Land, Etc.,* 143 F. 2d 408 (C. A. 4), certiorari denied, 323 U. S. 716; *Messer* v. *United States,* 157 F. 2d 793 (C. A. 5); *Southern California Fisherman's Assn.* v. *United States,* 174 F. 2d 739 (C. A. 9).

The assertion in the district court's findings (Pet. App. 50; R. 1080) that a landlord is under an affirmative duty "to interfere with, complain about, or protect the tenants against" the actions of the Government in the exercise of its sovereign powers unreasonably limits the right of the landlord and the Government to settle claims without protracted litigation. Similarly erroneous is the conclusion (Pet. App. 58; R. 1087) that permitting the Government "to approach, negotiate with and make demands for possession of tenants having unexpired leases" was wrongful. The policy of the law so strongly favors amicable settlement in this field that the statutes of many states, including Illinois, impose an attempt to purchase as a condition precedent to condemnation. The federal authority to condemn is not so limited (*United States* v. *Meyer,* 113 F. 2d 387, 394 (C. A. 7), certiorari denied, 311 U. S. 706) but certainly it is not wrongful to follow that policy.

The circumstance, relied on by petitioners (Pet. 29), that the lease with Clark-Congress was executed prior to institution of condemnation proceedings is irrelevant. Thus, in *Woodville, Okla.*

v. *United States,* 152 F. 2d 735 (C. A. 10), certiorari denied, 328 U. S. 842, a claim arising from the taking of a railroad right of way was settled prior to the institution of condemnation proceedings against the city. Thereupon, the city claimed compensation for the land in the right of way on the theory that there had been a reverter by abandonment of use for railroad purposes. This was rejected, the court stating (p. 738):

> All the steps necessary to effectuate the purposes of the act authorizing the construction of this project must be viewed as one proceeding. While the government acquired the various pieces of property, including the tract in question, by contract with the respective owners, and at different times, the respective rights and interests of all the parties must be considered as though the government had proceeded against all of them in a single condemnation proceeding.

See also *Scott* v. *United States,* 146 F. 2d 131 (C. A. 5). A distinction between settlements made before and after institution of condemnation proceedings would be purely formal and would require, without just cause, the United States to institute proceedings which might be entirely unnecessary. Neither the time of taking nor the amount of compensation is determined by the institution of proceedings.

The assertion in the district court's findings (Pet. App. 50; R. 1080) that except for the "col-

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laboration and cooperation of Clark-Congress Corporation in entering into the lease of June 22, 1951 * * *" the Government would not have been able to carry on alteration of the building in the fall of 1951, misconceives the sovereign authority to acquire property. The eminent domain power is frequently exercised simply by the physical taking of property, leaving the landowner to his remedy under the Tucker Act. *United States* v. *Causby,* 328 U. S. 256; *United States* v. *Dickinson,* 331 U. S. 745; *Campbell* v. *United States,* 266 U. S. 368. Such acts of government agents which, if performed by private persons might constitute a trespass, are not wrongful and may not be enjoined. *Hurley* v. *Kincaid,* 285 U. S. 95; *Yearsley* v. *Ross Constr. Co.,* 309 U. S. 18, 21; *United States* v. *Meyer,* 113 F. 2d 387 (C. A. 7). Thus, here, if the activities of the agents of the United States resulted in eviction of the tenants from the building, the result would be a taking under the power of eminent domain. Clark-Congress would not be liable.

There was not, however, such an eviction before the institution of these proceedings and the concurrent filing of the declaration of taking on December 12, 1951. By orders of the district court, all these tenants retained possession long after that date from which compensation was computed and awarded in the condemnation judgment (R. 9, 36–37; footnote 2, *supra,* p. 8). Therefore, the theory of an award based on

"constructive eviction" was error. It affords no basis for awarding Advertising in this proceeding what it was not entitled to receive in the condemnation judgment.

All other items in the three judgments are composed entirely of moving expenses (Pet. App. 53–54; R. 1083–1084). Moving expenses of a tenant whose entire term is taken are not compensable under the Fifth Amendment. *United States* v. *Petty Motor Co.*, 327 U. S. 372. The measure of compensation is the same whether a taking is by physical action or by means of condemnation proceedings. *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *United States* v. *Toronto Nav. Co.*, 338 U. S. 396.[3]

[3] Although the court below reluctantly held to the contrary (Pet. App. 75–81), we contend that its judgment, sustaining the motion of Clark-Congress to strike petitioner's crossclaims and counterclaim, can also be sustained on the ground that the district court lacked jurisdiction to hear such claims in a condemnation action. Rule 71A (a) of the Federal Rules of Civil Procedure, relating to condemnation, states that the Rules of Civil Procedure "govern the procedure" for condemnation "except as otherwise provided in this rule." Rule 71A (e) provides for the filing of an answer. It also provides: "No other pleading or motion asserting any additional defense or objection shall be allowed." Since the condemnation rule is specific as to the matters which may be put in issue, there is no authority for resort to other rules to inject collateral issues into a condemnation case. *United States* v. *76.15 Acres of Land, Etc.*, 103 F. Supp. 478 (N. D. Cal.); see also *United States* v. *534.7 Acres of Land*, 157 F. 2d 828 (C. A. 5).

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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United States Supreme Court
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1954.

No. 732

MERCHANTS MATRIX CUT SYNDICATE, INC., INTERTYPE CORPORATION, AND THE ADVERTISING CHECKING BUREAU, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

BRIEF OF CLARK-CONGRESS CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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May 12, 1955.

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UNITED STATES OF AMERICA AND CLARK-CONGRESS CORPORATION,

Respondents.

BRIEF OF CLARK-CONGRESS CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

ADDITIONAL STATEMENT OF THE CASE.[1]

The Treasury Department selected the Rand McNally Building as suitable to it for the Bureau of Public Debt. (R. 842, 843.) This selection was communicated to the

[1] For convenience the parties herein are referred to as follows: Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., collectively as "Petitioners" but separately as "Merchants", "Intertype" and "Advertising", respectively; Clark-Congress Corporation either as "Respondent" or "Clark-Congress;" General Services Administration as "GSA"; respondent United States of America as "the Government".

Administrator of General Services Administration (R. 843); and the Regional Director of GSA, for the district in which Chicago is located, was instructed about June 13, 1951 by the Administrator of GSA to acquire this building for the use of the Government. (R. 843.) In addition to acquiring the interest of Clark-Congress in the building by lease, subject to all existing tenancies, GSA acquired the interests of all other tenants in the building, except petitioners, by December 1, 1951.

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REASONS WHY THE WRIT SHOULD NOT BE GRANTED.

All of the transactions involved in the cross-claims cases are part of or related to the project of the Government to acquire and fit the Rand McNally Building, in Chicago, for the use of the Bureau of Public Debt. The petition is predicated on the erroneous premise that the alleged acquiescence of Clark-Congress in the noise, dust and disturbance created by the Government in rehabilitating the Rand McNally Building renders Clark-Congress liable for petitioners' expenses in moving from the premises. But the Court of Appeals held that the moving expenses resulted from the declaration of taking filed in the condemnation case.

Petitioners were tenants under leases in the Rand McNally Building. The Government acquired the interest of Clark-Congress, the landlord, by lease which was "in lieu of condemnation proceedings." (R. 974, 986.) The Government arranged with all other tenants, except petitioners, for the termination of their leases. Condemnation proceedings were instituted against petitioners, and their interests were acquired by a declaration of taking.

Upon trial, petitioners proved no damages against the landlord on account of any dust, noise or other disturbance or because of any interference with their business operations. They made proof only with respect to moving expenses (and the value of the Advertising leasehold hereinafter discussed, p. 11) despite the extravagant charges in the cross-claims relative to noise, dust, disturbance and conspiracy.

Petitioners enjoyed their premises and carried on their businesses until they moved pursuant to the declaration of taking and orders of the District Court in the condemnation proceedings to surrender possession to the Government. Nothing which Clark-Congress did caused them to move.

As the Court of Appeals stated (Op. 82):

> "Whether the ultimate theory of recovery against Clark-Congress is conveniently blurred in the pleadings or evidence is now beside the mark, since a declaration of taking was filed and processed. * * * Their interests were acquired by and to the extent of that declaration of taking."

The Court of Appeals said (Op. 82):

> "Regardless of how it is articulated each such pleading reverts to, and each is bottomed on, claiming damages because these three tenants had to find quarters elsewhere, and move."

The court also said (Op. 84):

> "Moving expenses are so inextricably woven into the termination of these leases upon the taking of the Government *U. S.* v. *Advertising Checking Bureau*, 204 F. 2d 770, 772 (7th Cir. 1953) *that they cannot be recovered indirectly, or on the side.*" (Emphasis supplied.)

To repeat, the Court simply held that the moving expenses, a consequence of condemnation by the Government, could not be included in petitioners' damages.

The Court of Appeals did not, as alleged (pet. 27), ignore or fail to follow the law of Illinois that a tenant has a cause of action against a landlord "who disturbs * * * his quiet enjoyment of the demised premises." This rule does not reach damages that result from the taking by the Government. But Illinois has held that a

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covenant of quiet enjoyment and possession does not extend to protect a lessee against the exercise of sovereign power in taking property for a public use. *Corrigan, et al. v. Chicago et al.*, 145 Ill. 537, 543 (1893). The Illinois Supreme Court held in that case that the lessee takes, as every other interest in land is taken, *subject to the exercise of the power of eminent domain whenever the public necessity and convenience demand it.*

It is also the law of Illinois that moving expenses may not be recovered in an action of tort by a tenant against his landlord. *Tobin* v. *French*, 93 Ill. App. 18, 22.

Petitioners assert (pet. 22) that the decision below is in "irreconcilable conflict" with decisions of this Court holding that the immunity of the sovereign does not protect parties with or through whom the sovereign deals against liability to those whom they may injure. There was no such issue in this case. The decision below in no wise conflicts with any decision of this Court. The Court of Appeals did not hold that Clark-Congress was immune from liability on any theory of sovereign immunity. All it held was that Clark-Congress was not liable for the moving expenses of these petitioners because their moving expenses were occasioned solely as a result of the declaration of taking.

ARGUMENT.

I.[2]

We discuss only such Questions Presented (pet. 2) and Reasons for Granting the Writ (pet. 14) as relate to the judgments against Clark-Congress.

This cause should not be reviewed by this Court, for the reason that the above mentioned Questions Presented and Reasons for Granting the Writ are totally unrelated to the decision of the Court of Appeals.

That decision was that the moving expenses could not be recovered. The court did not disregard the evidence or the findings of fact; but stated "they are estranged from significant items of evidence disclosed by this record." (Op. 83.) These significant items of evidence were: (1) A declaration of taking was filed December 12, 1951 by the Administrator of GSA by which the "right to use and occupy" the space of each petitioner in the Rand McNally Building was taken for the use of the Government for a term of years commencing January 1, 1952 (R. 9); (2) On December 26, 1951, an order was entered by the District Court that Intertype Corporation surrender possession of the premises "now occupied by it" to the Government on January 31, 1952 (R. 35); (3) On the same day the District Court ordered that Merchants Matrix Cut Syndicate, Inc. and The Advertising Checking Bureau, Inc. surrender possession of the premises "now occupied by them" on or before May 31, 1952 (R. 37); (4) Intertype surrendered possession of its premises on January 11,

[2] This brief follows the Roman numeral headings of the Petition for a Writ, beginning at p. 15.

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1952, the date it claimed to have been evicted (R. 41); (5) Advertising in its answer to the complaint, filed January 21, 1952, alleged: "Pursuant to said order (the order of surrender of December 26, 1951) and *in compliance therewith*, this defendant is about to vacate the premises as aforesaid as required by said order" (R. 44); (6) Merchants alleged in its cross-claim (R. 56) that it had occupied its space continuously from April 1, 1922 until the "12th day of December, 1951, at which time cross-claimant was evicted from said premises; that since such time cross-claimant's occupancy of aforesaid space *has been under an order of this court* allowing cross-claimant to remain in possession of these premises until the 31st day of May, 1952 * * *;" (7) Advertising moved out of the premises in March, 1952 (R. 718); and Merchants moved out of its premises on April 23, 1952 (R. 418); (8) The judgments entered in the condemnation case (tried before the cross-claims case), in favor of Intertype and Merchants, on their motion, adjudged the compensation the Government should make "for the taking of the leasehold estate" of each of them (R. 619); (9) All of the transactions are encompassed in an entire project of the Government to acquire and fit the Rand McNally Building for the use of the Bureau of Public Debt: (a) The Treasury Department selected this building (R. 843); (b) The Regional Director of GSA for Region 5 (which includes Illinois) was authorized prior to June 22, 1951 to acquire the use of this building (R. 675, 843); (c) On June 22, 1951, the interest of Clark-Congress, the landlord, was acquired by lease; (d) Thereafter and prior to January 1, 1952 the leases of all of the tenants, except petitioners, had been terminated and the Government had acquired their spaces (cross-claimants Ex. 10, R. 1004); (e) The interests of petitioners were acquired through the condemnation proceeding instituted by the district attorney at the request

of the Administrator of GSA and by his declaration of taking. (R. 7.)

These various acquisitions by lease from the landlord and termination of tenancies, must be treated as taken by condemnation. In *Woodville* v. *U. S.*, 152 F. 2d 735, 738 (C. C. A. 10th, 1946 certiorari denied, 328 U. S. 842), brought to condemn streets and alleys, the court said: "While the government acquired the various pieces of property, including the tract in question, by contract with the respective owners, and at different times, the respective rights and interests of all the parties must be considered as though the government had proceeded against all of them in a single condemnation proceeding."

These "significant items", detailed above, convinced the court below that the moving expenses for which petitioners obtained judgments flowed from acts of the Government in acquiring the property and did not result from the alleged acts of Clark-Congress. The position of the court below, as reflected in the opinion, is that the moving expenses were a necessary and direct consequence of the filing of a declaration of taking by the Administrator of GSA and the orders of the District Court that petitioners surrender possession to the Government. This position is correct as is shown by statements in the cases noted below.

First of all, upon the filing of a declaration of taking, 40 U. S. C. 258a gives the court power to fix the time within which parties in possession "shall be required to surrender possession." In *United States* v. *Petty Motor Co.*, 327 U. S. 372, 378 (1946) the court said the costs of removal or relocation "are personal to the lessee. The lessee would have to move at the end of his term unless the lease was renewed." At p. 380 the Court speaks of the tenant's removal as "its ouster by the order of possession." In *United States* v. *Westinghouse E. & Mfg. Co.*, 339 U. S. 261, 262, the Court said: "Respondent, in order

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to comply with the District Court's order of immediate possession, incurred expenses for the removal of its personal property." At p. 266, the Court speaks of the tenant as the "ousted leaseholder". In *William Wrigley, Jr. Co.* v. *United States*, 75 Ct. of Cl. 569, the court said, that just compensation does not include "consequential damages resulting from a forced removal of property taken by the Government." It also said: "These are all inconveniences and expenses incidental to the surrender of possession * * * The title to all property is held subject to the implied condition that it must be surrendered whenever the public interest requires."

The court below took into consideration, not only the rule that moving expenses are consequential damages, necessitated by the taking and the order to surrender possession, but also the rule that quiet enjoyment covenants are not violated through or by the exercise of the power of eminent domain.

Under Illinois law a covenant of quiet enjoyment does not extend to protect against the exercise of the sovereign power in taking property for a public use. In *Corrigan, et al.*, v. *Chicago, et al.*, 144 Ill. 537, 543 (1893), the court said:

> "The lessee takes the term as every other interest in land is taken, subject to the exercise of that power (eminent domain) whenever the public necessity and convenience demand it. He holds and enjoys the estate granted, subject to the exercise of the sovereign power to appropriate his land to a public use, upon paying to him just compensation; and if he suffers loss, or is deprived of his estate, he is provided with the same remedy that is given to all other owners, and holds his title subject to this right, as the landlord holds his title. Hence, it has been held that a taking under the right of eminent domain is not a breach of the covenant for quiet enjoyment, and does not technically amount to eviction."

In *Frost* v. *Earnest*, 4 Whart 86, a case very generally cited, and cited in a number of Illinois cases, it is said:

> "The remedy of the vendee is to look to the legislative provisions made for his indemnity, and not to the covenant of quiet enjoyment, which was introduced into conveyance for purposes entirely different."

Other cases to the same effect are *Osborn* v. *Nickolson*, 80 U. S. 654, citing *Frost* v. *Earnest*; *Leonard* v. *Autocar Sales & Service Co.*, 392 Ill. 182, 190 (1946); *Goodyear Shoe Machinery Co.* v. *Boston Terminal Co.*, 176 Mass. 115 (1900). While petitioners cite Illinois cases (pet. 27) to the effect that a tenant may sue his landlord who disturbs or permits a co-tenant to "disturb his quiet enjoyment," they do not cite Illinois cases that hold the tenant may recover from the landlord for damage accruing from acts of the Government in the exercise of eminent domain, nor an Illinois case holding that he may recover moving expenses for any kind of eviction.

It has been held in Illinois that moving expenses may not be recovered in a tort action. In *Tobin* v. *French*, 93 Ill. App. 18, 22 (1900), in trespass on the case the defendants began alterations in the building for the purpose of adding two additional stories, and as a result great quantities of dirt, dust and lime poured into plaintiff's rooms, the stairways and halls were blocked, his furnishings were rendered unfit for use, his wife's health was impaired so that he was compelled to quit the premises. It was held that moving expenses could not be recovered. The court said, p. 22: "Although we regard the cost of moving as an improper element of damage in such a case, we don't think the admission of it in evidence constitutes a sufficient ground for reversing the judgment." This was because the amount of the judgment was "fully supported by other evidence." Petitioners admit (pet. 21): "The whole basis for reversing the judgments against Clark-Congress

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appears to have been the fact that moving expenses were included as items of petitioners' damages."

Advertising Checking Bureau, Inc. is not entitled to recovery from Clark-Congress for the value of the remaining period of its leasehold. In *U. S.* v. *Advertsing Checking Bureau, Inc.*, 204 F. 2d 770 (1953 7th Cir.) Advertising appealed from a summary judgment in this case below that it was not entitled to just compensation because of a condemnation clause in its lease. It contended that its leasehold had not been terminated and therefore it was entitled to just compensation. But the court held (p. 772) that Advertising's "lease terminated upon the taking by the Government."

II.

Petitioners argue that the decision below "is in irreconcilable conflict with the decisions of this Court which hold that the immunity of the sovereign does not protect parties with or through whom the sovereign deals against liability to those whom they injure in the course of their actions in the sovereign's behalf." (pet. 22); that the Court of Appeals treated the landlord's right of indemnity from the Government under its lease "as ousting the trial court from jurisdiction to grant relief against the landlord" (pet. 25); that the Court of Appeals ordered the claims stricken because it believed that these claims sought to recover indirectly from the sovereign what petitioners could not obtain from it directly. (pet. 25.)

The Court of Appeals made no decision as to immunity from suit; made no mention of the landlord's indemnity. It decided only that the moving expenses could not be included as damages.

The cases cited (pet. 22) which are asserted to be in conflict with the decision here, did not involve damages

consequential on condemnation, but involved: recovery of possession of land in *U. S.* v. *Lee*, 106 U. S. 196 (1882); an accounting under a certain contract in *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U. S. 549 (1922); recovery of brokerage commissions by a broker in *Federal Land Bank* v. *Priddy*, 295 U. S. 229 (1935); damages for failure through negligence to provide proper care for cattle under a cattle-feeding contract in *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381 (1939); damages for death due to tort of steamship company in *Brady* v. *Roosevelt Steamship Co.*, 317 U. S. 575 (1943). In all of these cases the question before the Court was not liability but whether the defendants were immune from suit. The Court of Appeals held not that Clark-Congress was immune from suit, but that it was not liable for moving expenses.

The language of the Court demonstrates it was not deciding a question of immunity by holding that the moving expenses resulted from the filing and "processing" a declaration of taking (Op. 82); and by the further holding that urging "breaches and violations of convenants of quiet enjoyment and peaceable possession because Clark-Congress, allegedly, ratified, sanctioned and acquiesced in the governmental acts culminating with instituting its condemnation case" does not go behind the taking. Such decision is utterly foreign to the question of immunity.

III.

Petitioners argue, (pet. 27) that the court below ignored and failed to apply the common law of Illinois, citing numerous cases from Illinois and other jurisdictions as holding that a tenant may sue a landlord "who disturbs or permits co-tenants to disturb his quiet enjoyment of the demised premises." (pet. 27.) We discussed this

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question under heading I, p. 6. The decision of the court below does not conflict with these cases—it only excludes moving costs arising from condemnation.

Petitioners cite *Dolman* v. *United States Trust Co.*, 134 N. Y. S. 2d 508 Sup. Ct. N. Y. Co. (1954) in an effort to escape the rule that covenants of quiet enjoyment are not breached through the exercise of eminent domain. The *Dolman* case also announces this rule. This case arose on a motion to dismiss the complaint as not constituting a cause of action. It alleged that for the purposes of inducing the city to acquire the premises by eminent domain, the defendant gave the city an option to purchase any award that defendant might receive in the event of condemnation for an amount less than the assessed valuation and the market value of the property. Thereupon the option was exercised and then the city condemned. The court held that the rationale behind the protection to the landlord from quiet enjoyment covenants "is that here is an act of Government separate and apart from the wish and cooperation of private parties;" but that this general rule does not exculpate the landlord where "the act of condemnation has been actively incited by the landlord for purposes of its own." In the face of the project of the Government to acquire and use the Rand McNally Building it is nonsensical to contend that Clark-Congress incited condemnation "for purposes of its own."

IV.

Under this heading petitioners admit that the court below "reached the conclusion that such claims (petitioners' claims) are permissible," in the District Court, but contend the effect of the decision is to deny jurisdiction of such claims in any case, by holding that a condemnee may not by cross-claim in a condemnation case

recover from private parties damages inflicted upon the condemnee in connection with the taking of property by the government. The simple answer is, as previously said in this brief, that the court below held only that petitioners may not have moving expenses on their cross-claims.

Petitioners also claim that the court's order to strike the counterclaim and cross-claims "vitiated and emasculated" (pet. 31) its holding that the cross-claims were properly filed. Since the claims were "bottomed on claiming damages because these three tenants had to find quarters elsewhere, and move," as the court expressed it, (Op. 82) they properly were ordered stricken.

V.

Petitioners say, p. 32: "The purpose of taking petitioners' lease space was to gain possession under the Government's lease, and not to gain title to the building." The purpose is stated in the complaint (R. 8) "the housing of Federal agencies outside the District of Columbia." The landlord's interest having been acquired by lease, it was necessary to condemn that of these tenants.

Petitioners state, "the Government's *lease* was *illegal*, the *taking* was *illegal*, and vacating the condemnation awards was likewise *illegal*." (pet. 32) The legality of the lease was neither raised nor decided below nor was it included in Questions Presented or Reasons for Granting the Writ.

Petitioners, p. 34, contend that the action of the Court of Appeals denies due process of law. To support this they set forth nineteen "important elements" as amounting to due process of law. They admit, p. 36, no one of these items standing alone would be a denial of due proc-

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ess but assert that the cumulative effect of all leaves petitioners "with no hope for a final order authorizing full payment of the entire value" for months or years to come. This list of "important elements" while impressive as to number is neither impressive nor important as to substance. We think we need say nothing more from the standpoint of Clark-Congress than that the whole list of items fails to demonstrate a denial of due process of law. None of these items intimates that petitioners did not, and many of them demonstrate that they did, have their day in court.

Conclusion.[3]

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 12, 1955.

[3] Respondent does not waive but reserves its right, in the event the Court takes this case, to urge and argue its motions to strike the counterclaim and cross-claims on the ground that Rule 71A(e) does not permit of their filing. (R. 72, 73, 75.)